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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

PHILLIPS PETROLEUM COMPANY, *Petitioner,*

v.

ASHLAND OIL, INC., *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Phillips Petroleum Company prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the district court is reported at 364 F. Supp. 6 and is reprinted in the appendix at pages 53a-71a below. The en banc opinion of the court of appeals is reported at 554 F.2d 381 and is reprinted at pages 3a-35a below. An opinion of a panel of the court of appeals, superseded by the en banc opinion, is reprinted at pages 37a-52a below.

JURISDICTION

The judgment of the court of appeals sitting en banc on rehearing (p. 1a, *infra*) was rendered on May 10, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A producer with good title to a natural gas stream contracted to sell its full interest in the gas stream, including the helium component. It filed the contracts with the Federal Power Commission as rate schedules under the Natural Gas Act. Some years after the making of the contracts the purchaser of the gas stream entered into a separate contract to extract and sell to the United States some of the helium contained in the gas stream. The purchaser warranted its title to the helium and agreed to pay, up to a certain amount, any judgments resulting from claims respecting the the helium; the United States, in turn, undertook to indemnify the purchaser to the extent that such judgments exceeded the agreed amount. Alleging diversity of citizenship as the exclusive ground for federal jurisdiction, the producer sued the purchaser in a federal district court for the value of the helium contained in the natural gas stream; the United States intervened to protect its interests arising from the indemnity clause of its contract with the purchaser. The questions presented are:

1. Whether, because the United States undertook in a separate contract with the purchaser to indemnify it against judgments exceeding an agreed amount, federal common law, rather than state law, governs a dispute between the producer and the purchaser over whether and to what extent the purchaser is obligated to the producer to pay more than the contract price for the helium contained in the gas stream.

2. Whether Section 11 of the Helium Act, which exempts helium from FPC rate regulation under the Natural Gas Act, entitles the producer to disregard the price provisions of its contract with the purchaser and claim additional compensation for helium delivered as part of the gas stream covered by the contract.

STATUTE INVOLVED

Section 11 of the Helium Act of 1925, as added by the Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. § 167i, provides:

> "The provisions of the Natural Gas Act of June 21, 1938 (52 Stat. 821; 15 U.S.C. 717-717w), as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 4 and 5 of the Natural Gas Act, as amended, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis."

STATEMENT

Petitioner Phillips Petroleum Company is the purchaser, pursuant to contracts, of natural gas produced by respondent Ashland Oil, Inc., from wells in Texas of which Ashland is the lessee under typical oil and gas leases. The natural gas stream contains a minor but significant amount of helium, which is noncombustible but valuable for a variety of purposes other than heating. The Ashland wells are in a natural gas field that is among those rich enough in helium to make its extraction technologically feasible. That fact was known when the contracts for sale of the natural gas stream were made.

Under a decision of the court below in related litigation, typical oil and gas leases in the helium-rich Texas fields convey title to the helium as well as other parts of the natural gas stream. *Northern Natural Gas Co.* v. *Grounds,* 441 F.2d 704, 710-15 (10th Cir. 1971). And, according to the same decision of the court of appeals, lessee/producer contracts for sale of the natural gas stream, such as Ashland's contracts with Phillips, also convey to the purchaser title to the helium content. *Id,* at 717-18.

Under the decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954), producer contracts for the sale of natural gas for resale in interstate commerce must be filed with the Federal Power Commission. So filed, such contracts constitute rate schedules under the Natural Gas Act. The Ashland-Phillips contracts have been so filed. The FPC has power under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d, to substitute for the parties' contract prices other rates that it finds just and reasonable. At

no time, however, has the FPC exercised its powers under Sections 4 and 5 to prevent Ashland from collecting from Phillips the full contract price for the natural gas stream conveyed to Phillips.[1]

In 1960, comprehensive amendments to the Helium Act of 1925 were enacted, providing for a forward-looking program of helium conservation. 74 Stat. 918, amending 43 Stat. 1110, 50 U.S.C. §§ 167-167n. Under authority granted by the new statute, the Department of the Interior in 1961 concluded contracts with Phillips and three other companies. These contracts called for the Government to purchase for conservation storage crude helium extracted by the four companies at helium extraction plants to be designed and built by them at their expense and risk. The plants are so located as to enable the contractors to process the helium-rich natural gas of the Hugoton-Anadarko fields of Texas, Oklahoma and Kansas. Under the contracts, Phillips and the other helium contractors warranted title to the helium sold to the Government and assumed the burden of any increased amount they might be compelled to pay for helium up to about $3 a thousand cubic feet ("mcf"). But the Government agreed by paragraph 7.4 of its contract with Phillips (and comparable provisions of contracts with the other contractors) to reimburse Phillips for any amount in excess of about $3 per mcf that Phillips might be compelled to pay for the helium delivered to the Government.

Section 11 of the Helium Act, added by the 1960 amendments (p. 3, *supra*), provides that the Natural

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[1] Ashland did not take full advantage of the price escalation provisions of the contracts, but that was its choice, not a matter of FPC regulation. See Ashland Oil & Refining Co. v. FPC, 421 F.2d 17 (6th Cir. 1970).

Gas Act does not apply to the sale of helium and that revenues from and costs attributable to helium are to be disregarded in any determination by the Power Commission of rates for natural gas companies.

The *Grounds* case, referred to above, is a large consolidated case involving the title to much of the helium extracted for the government conservation program. It arose in the District Court for the District of Kansas. In that case the court of appeals held that, even though the producers' contracts for the sale of natural gas conveyed title to the helium component of the gas stream, the producers were not bound by the contract price if the purchaser extracted helium from the gas stream for the Government. The court reached this result on the basis of what it interpreted to be the combined effect of the Natural Gas Act and Section 11 of the Helium Act; it explained that, because "[c]ommon provisions of the gas purchase contracts [that] call for periodic price escalation, arbitration or renegotiation . . . have been largely nullified by the FPC regulations" and because the FPC was deprived by Section 11 of the Helium Act of power thus to nullify the contracts insofar as they covered helium, the producers were entitled to some amount for helium in addition to what they were paid under their natural gas sales contracts. 441 F.2d at 722. The court remanded the case to the district court for a determination of the reasonable value of the helium extracted by the helium conservation contractors and sold to the United States.

The Ashland-Phillips contracts do not provide for arbitration or renegotiation of price, and the FPC has never interfered with the operation of their price escalation clauses (n.1, *supra*). Rights under these con-

tracts were not adjudicated in the *Grounds* case. Ashland brought suit separately against Phillips in the District Court for the Eastern District of Texas asking for compensation in addition to its contractual compensation for the helium. The case was transferred to the District Court for the Northern District of Oklahoma. Because of its potential liability under the indemnity clause of its contract with Phillips, the United States intervened.

In the district court Ashland asserted jurisdiction solely on the ground of diversity of citizenship. The case was nevertheless tried by the district court as one arising under federal law and governed by federal law. The district court went so far as to say that "the United States, through the defendant, Phillips, and by reason of the Helium Act, confiscated the helium of the plaintiff and royalty owners rather than acquiring it by condemnation . . . ." (P. 67a.) The district court's theory that federal law governed, if not its belief that the Government had confiscated the helium and invited an inverse condemnation action, was induced by the expansive view the court of appeals had taken of the scope of its *Grounds* decision in *Texaco, Inc.* v. *Phillips Petroleum Co.*, 481 F.2d 70 (10th Cir. 1973). *Texaco* was another helium title and compensation case, both parties to which were Delaware corporations. The court of appeals there held that the district court had jurisdiction despite the lack of diversity because the case arose under federal law within the meaning of 28 U.S.C. § 1331(a). This Court summarily reversed that decision on the certiorari papers, holding that *Grounds* did not convert an ordinary common-law contract or *quantum meruit* action governed by state law into a federal case by interpret-

ing certain federal statutes to deprive the helium purchasers of a defense of payment. *Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S .125 (1974).

Pursuing its theory of federal law in the Ashland-Phillips case, the district court, in computing the additional amount Phillips must pay Ashland for helium, worked back from a figure that represented its estimate of the fair value of the helium that Phillips extracted for the United States and arrived at a total of approximately $1 million for helium delivered to Phillips between 1963 and 1972; it awarded yearly interest on the annual components of that amount, bringing the total to $1.4 million, and attorneys fees. It directed that the landowners that leased the oil and gas rights to Ashland receive half of the amount to be paid by Phillips.

By the time the case was decided by a panel of the court of appeals, this Court had laid to rest in *Texaco* the mistaken idea that helium title and compensation litigation arises under federal law. The panel, however, did not vacate the district court's judgment and remand for a new trial uninfected by the fundamental error of law that the district court had committed. Rather, the panel affirmed the district court in most respects. It disapproved the district court's award of attorneys fees and the requirement that Ashland share its recovery from Phillips equally with its lessors, which was squarely inconsistent with that part of the *Grounds* decision that had held that Texas oil and gas leases convey title to helium as part of the rights to natural gas. But on the major points, the panel affirmed Ashland's recovery from Phillips of hundreds of thousands of dollars more than the amount for which it had con-

tracted to sell its gas stream to Phillips. A petition for rehearing en banc was granted. The en banc reargument was heard a year and a half after the petition was granted. Appeals from the final, valuation decision of the district court in *Grounds* were heard en banc at the same time; no decision has yet been rendered on those appeals.

In this case the en banc court reached much the same judgment as the panel. It differed from the panel only in finding some fault with the district court's computation of the value of helium, and it therefore remanded for further proceedings on that issue. One judge dissented.

Despite this Court's summary reversal of *Texaco*, the court of appeals sustained the district court's ruling that federal law governed the case. Deprived by this Court of its theory that under *Grounds* an action to recover additional compensation for helium arises under the Helium Act and the Natural Gas Act—which was the theory that had animated the district court's decision—the court of appeals devised a new theory. It said that federal law governed because of the indemnity provision of the contract between the United States and Phillips, a contract to which Ashland was an utter stranger, and because the United States intervened in the litigation to protect its interest arising from the indemnity provision. The court reached the issue of what law governed the dispute over the valuation of the helium and such incidents of the dispute as the applicable statute of limitations and the propriety of the district court's award of prejudgment interest only because it rejected, by virtually disregarding, a threshold argument advanced by Phillips

—that there was no reason to relieve Ashland of its contractual obligation because, unlike the contracts in *Grounds* that had been superseded by FPC regulation under the Natural Gas Act, there had been no interference by the FPC with Ashland's ability to collect its full contract price for the natural gas stream, including helium, it had sold to Phillips.

REASONS FOR GRANTING THE WRIT

The court below has decided an important question of federal law in a way that conflicts with applicable decisions of this Court. To begin with, the holding that federal law and not state law governs the dispute between Ashland and Phillips cannot be reconciled with *Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125 (1974). And in its attempt to find a basis for applying federal law by which conflict with *Texaco* could be avoided, the court brought itself into conflict with the line of cases beginning with *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), and culminating with last term's *Miree* v. *DeKalb County*, No. 76-607, decided June 21, 1977, that define the special circumstances in which the need for "a uniform national rule . . . to further the interests of the Federal Government," *id.*, slip op. at 3, warrants application of "federal common law" in a diversity suit.

The attempted evasion of *Texaco* must be of concern to this Court. Apart from the Court's interest in the integrity of its precedents, the question raised by the application of federal common law to the private dispute between Ashland and Phillips is of nationwide importance because of its threat to unsettle the applicable law in many diversity cases by making the ap-

plicability of federal law to a commercial dispute between two private parties turn on such accidental factors as whether one of the two parties has a separate indemnity agreement with the Government and perhaps even whether the Government intervenes in their lawsuit.

The court below has also decided an important question of the meaning and effect of Section 11 of the Helium Act that has not been but should be decided by this Court. It has ruled that Section 11 means that effect cannot be given to an unfrustrated contract for the sale of a natural gas stream merely because the contract was filed with the Federal Power Commission pursuant to the Natural Gas Act. The court in so ruling went far beyond the precedents on which it relied, which concern the very different matter of preventing regulated carriers or utilities from discriminating among their customers by providing some but not all of them with goods or services at less than their cost or value. The novel ruling may have been forecast by the court below in *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704 (10th Cir. 1971), but it was encumbered with a host of other questions when review of that decision was sought in this Court. 404 U.S. 951, 1063. The issue is now posed clearly and squarely.

I.

The ruling of the court below on the applicability of federal law can be understood only against the background of *Grounds* and *Texaco*. We attempt to explain the ruling in Section A below and then state why it should be reviewed in Sections B and C.

A

In both its complaint and amended complaint Ashland alleged only diversity of citizenship as a basis for federal jurisdiction. (App. 1-13, 33-40.) [2] It did not profess to assert any federal claims. These facts alone would ordinarily call for application of the principle that, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R.R.* v. *Tompkins,* 304 U.S. 64, 78 (1938).

But the district court, quoting at length from the court of appeals' ill-fated analysis in *Texaco, Inc.* v. *Phillips Petroleum Co.,* 481 F.2d 70 (10th Cir. 1973), *rev'd,* 415 U.S. 125 (1974), concluded that it possessed federal question jurisdiction as well as diversity jurisdiction. It said that the case arose under the Helium Act; it concluded that Ashland's claims were in essence founded on a "taking . . . in the nature of condemnation" implemented through the Helium Act. (P. 67a.) The court adhered to its federal condemnation theory by computing Ashland's damages not by reference to all helium contained in the gas stream but only with respect to helium extracted under Phillips' helium conservation contract with the United States. (Pp. 60a-62a.) Still applying federal law, the district court awarded Ashland prejudgment interest for a period that included years in which, the court held, the applicable statute of limitations was tolled by federal equitable principles. (Pp. 69a-70a.)

Though it engaged in a very different analysis, the court of appeals en banc affirmed the district court's

[2] "App. ——" refers to the appendix in the court below.

judgment in most relevant respects, remanding for recalculation of Ashland's damages. Rejecting what it termed the district court's "confiscation-condemnation theory" (p. 22a), the court of appeals ruled that the principles enunciated in *Grounds* governed "[t]he basic legal relationships among the landowners, producers and gas purchasers . . . [and] the relationship of the Natural Gas Act and the Helium Act." (P. 7a.) But, in the light of this Court's intervening opinion in *Texaco,* that was not enough to justify the district court's application of federal law. The court of appeals therefore turned explicitly to the Government's interest in the case as a basis for applying federal law. It discussed at length the Government's participation in the litigation, detailed the allegations of the Government's complaint in intervention, characterized the Government as the "real party in interest," observed that these factors rendered *Erie* of doubtful relevance, and concluded: "the circumstances direct that federal law be applied." (P. 18a.) Engaging in an extended discussion of cases applying "federal common law," (pp. 19a-21a) the court of appeals described *Grounds* itself as such a case. That is the unmistakable import of its statement that "federal law was applied" in *Grounds* (p. 17a) and its pointed repetition of the fact that *Grounds* involved a multitude of legal interests arising under the laws of three states (pp. 5a, 18a-19a, 21a).

Having thus intertwined *Grounds* with the federal common law cases, the court of appeals proceeded to affirm the principal aspects of the district court's decision. The court sustained the district court's so-called "work-back" method of computing the value of the helium contained in the natural gas stream that

Ashland had sold to Phillips and the application of this method of valuation only to the helium purchased from Phillips by the Government. The court of appeals thus held, implicitly, that the "work-back" method and its limited application, derived from the district court's condemnation theory, conformed with its novel alternative theory of why federal law applied. The court of appeals expressly applied federal law in upholding the district court's award to Ashland of prejudgment interest and its determination that the running of the statute of limitations had been tolled by equitable considerations. (P. 22a.)

B

The decision below cannot be reconciled with this Court's recent holding in *Texaco,* which pointedly corrected an egregious error made by the court below.

In all relevant respects save one, the *Texaco* litigation is the twin of this case: Texaco, like Ashland, asserted claims against Phillips for the value of helium contained in a stream of natural gas that it had sold to Phillips and from which Phillips subsequently extracted helium under its conservation contract with the United States. But Texaco, unlike Ashland, could not ground federal jurisdiction in diversity of citizenship. Accordingly, it alleged, and the court below held, that Texaco's claim arose under Section 11 of the Helium Act and the Natural Gas Act and jurisdiction was therefore conferred by 28 U.S.C. § 1331.

The court of appeals' decision in *Texaco* rested on *Grounds.* There the court of appeals held that producers in the position of Texaco (or Ashland) "fall into the void created by" Section 11 and the Natural Gas

Act. 441 F.2d at 722. The "void" was a result of the fact that Section 11 exempts helium from regulation by the Federal Power Commission under the Natural Gas Act but gives no other agency "jurisdiction over the helium value of the natural gas." *Id.* The producers' contracts did not fill the void because their "price provisions . . . have been superseded by FPC rate regulation." *Id.* The void was to be filled by judges who would calculate the reasonable value of helium without regard to the value placed on it by freely contracting buyers and sellers. Whether the judges would be guided by federal or state law was left unstated in *Grounds,* though the court was later to describe *Grounds* as a case in which federal common law was applied. (P. 13, *supra.*) In *Texaco,* the court went further and held that Section 11 of the Helium Act was the source of the cause of action for reasonable value of the helium and therefore that the case arose under Section 11 and the Natural Gas Act. This Court reversed. It held that "Texaco's suit for the reasonable value of the helium is, in effect, an action in *quantum meruit,* whose source is state law and not federal law." 415 U.S. at 125. The role of federal law, in the form of Section 11 of the Helium Act, "is no more than to overcome a potential defense to the action." *Id.*

At the time this Court decided *Texaco,* its decision in *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), was fresh in mind. There the Court had held that "§ 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin." *Id.* at 100. The Court when it decided *Texaco* was thoroughly conversant with *Grounds* and with the role of the Federal Government in the helium pro-

gram. If it were permissible to infer from the federal role that *Grounds* itself and then Texaco's case (and now Ashland's identical case) arose under federal common law, the inference could just as well have been drawn by this Court then as by the court of appeals now. Though the question of jurisdiction is always open, the record will be searched to sustain jurisdiction, *Sun Printing & Publishing Ass'n* v. *Edwards,* 194 U.S. 377 (1904), and jurisdiction once acquired will be saved even if to save it requires adoption of grounds different from those originally asserted, *cf. City of Kenosha* v. *Bruno,* 412 U.S. 507, 511-14 (1973); 28 U.S.C. § 1653. Yet the Court in *Texaco* could not have been clearer in its judgment that Texaco's was an action in *quantum meruit* "whose source is state law and not federal law." It did not hint that federal jurisdiction could be saved by invoking *Illinois* v. *City of Milwaukee* and positing a source in federal common law for the *quantum meruit* action that Texaco then had brought (and Ashland now has brought). Its opinion is inconsistent with the possibility that there is such a source.[3]

C

Even if it could be reconciled with *Texaco,* the decision below would remain in conflict with the very decisions of this Court on which the court below relied

[3] Should it be urged that this case differs from *Texaco* because here the Government intervened in Ashland's lawsuit, that would itself be reason enough for granting review. Whether the presence of the Government as an intervening party means that federal law governs a dispute between two private parties when state law governed an identical dispute in which the Government chose not to intervene is a novel question that, if seriously presented as a question, this Court should decide.

in concluding that "federal common law" governed the dispute between Phillips and Ashland. Though the court below went so far as to exaggerate the Government's role into that of the "real party in interest" (p. 18a), its opinion acknowledges, as it must, that the Government's interest in the litigation arose entirely from the indemnity provisions of its helium conservation contract with Phillips, under which "[t]he United States is liable for some of the additional amounts which Phillips will have to pay." (*Id.*)

Why the court thought that this undoubted fact justified the application of federal law to the dispute between Ashland and Phillips is not readily ascertainable from its opinion. The court stressed that the United States intervened in the case because of its potential liability (*id.*), but the court could not have meant that federal law applies when the Government elects to intervene and state law applies when it does not (n.3, *supra*). The court twice noted that the Government was in possession of much of the helium in question (pp. 18a, 21a) but never explained the significance of that fact. For the rest, the court referred to the "multitude of claimants, the variations in state law, and the *Clearfield* doctrine" (p. 21a) but without meaningful analysis of why the *Clearfield* doctrine leads to the invocation of federal law in a diversity case merely because the Government is in the background, a step removed from the transactions in issue, and those transactions involve many claimants and possible variations in state law.

Having adopted federal law without analysis, the court applied it without discrimination. It applied it in sustaining the district court's federal condemnation

theory of valuation and in awarding prejudgment interest and holding, apparently, that "equitable considerations" lifted what would otherwise be the bar of the statute of limitations to some part of Ashland's claim. (Pp. 13a, 22a). In this latter respect, it ignored the rule, recently reaffirmed by this Court, that even in cases that arise under federal statutes in which federal law unquestionably applies, state law ordinarily is controlling as to limitations and as to the tolling of the applicable limitations period when Congress has prescribed no such period or tolling rule. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462-67 (1975).

When the analysis that is lacking in the court's opinion is undertaken, no reason appears for applying federal law to determine Phillips' liability or any of the incidents thereof.

The contract between Phillips and the United States contemplated, so far as is relevant to this litigation, that the Government would rely on Phillips' warranty of title to the helium to be extracted but would indemnify Phillips, above an agreed amount, for judgments resulting from claims to Phillips' helium. The United States, in other words, chose to acquire its helium by purchasing Phillips' title to the helium and by undertaking to limit Phillips' monetary exposure in potential litigation challenging Phillips' title. The court below recognized as much, albeit backhandedly, when it observed that the United States "sought to, and did, acquire possession of the helium . . . [and] in so doing it set up the contractual barriers between itself and the landowners and gas producers, and also put off the inevitable day of reckoning as to ownership." (P. 21a.)

These circumstances are the very antithesis of the circumstances prevailing in cases in which the controversy, and the rights and duties of all parties, "find their roots in the same federal sources." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943). Here the United States acquired its helium by purchase from Phillips, whose title to the helium depended on state law governing the interpretation of Phillips' wholly separate contracts with Ashland, which long antedated Phillips' contract with the United States.

There is no question that, in litigation arising from the helium conservation contract between Phillips and the United States, 'federal common law' would govern. *See, e.g., United States* v. *Seckinger*, 397 U.S. 203 (1970); *but see United States* v. *Yazell*, 382 U.S. 341 (1966). Or if the Government, unable to make a voluntary purchase of helium on reasonable terms, had resorted to condemnation of all interests, including Ashland's, as the Helium Act allows, § 3(a)(2), 50 U.S.C. § 167a(a)(2), federal law would apply. But by contracting with Phillips as it did, and by providing for the payment of an indemnity contingent on possible litigation between Phillips and claimants, the United States expressed an intention that is at the opposite pole from an intention that federal law should govern disputes between Phillips and producers such as Ashland concerning who owned the helium or the value of relative ownership interests in the helium. This case therefore falls in line with this Court's decisions holding that comparably attenuated federal interests do not supersede the principle of *Erie*.

In *Miree* v. *DeKalb County*, No. 76-607, decided June 21, 1977, the Court's most recent pronouncement

on the point, state law rather than federal common law governed the claims of a plaintiff claiming to be a third party beneficiary of certain safety covenants of a contract between a municipal airport proprietor and the Federal Aviation Administration; the litigation "raise[d] no question regarding the liability of the United States or the responsibilities of the United States under the contract," slip op. at 4, and "the resolution of petitioners' breach of contract claim against respondent will have no direct effect upon the United States or its Treasury," *id.* at 5. In this case, like *Miree*, the *"Clearfield* rationale [is] inapplicable" because "only the rights of private litigants are at issue . . ." *Id.; see also Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966); *Bank of America* v. *Parnell*, 352 U.S. 29 (1956).[4]

[4] None of the other decisions of this Court cited in the opinion of the court below warrants a different conclusion. Each involves either a conflict between state law and federal policy or the application of federal law in cases arising under federal law or functions demanding nationwide uniformity. National Metropolitan Bank v. United States, 323 U.S. 454 (1945), followed *Clearfield Trust* in the application of federal common law to negotiable instruments issued by the Government. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), which was decided before *Clearfield Trust*, applied policies enunciated in the Federal Reserve Act in a suit by the FDIC, arising under the Federal Reserve Act, to recover on a demand note that was given without consideration and for the purpose of deceiving the FDIC and others concerning the assets of the bank that was payee on the note. Holmberg v. Armbrecht, 327 U.S. 392 (1946), applied federal equitable principles to toll the running of the statute of limitations on a federally created equitable cause of action. United States v. Allegheny County, 322 U.S. 174 (1944), held that federal common law governed the interpretation of a federal contract vesting the United States with title in certain machinery, rather than conflicting state law that would have limited the Government's title to a reversionary interest. United States v. Standard Oil Co., 332 U.S. 301 (1947), held that federal common law governs tortious interference with the relationship of military personnel to the federal government. United States v. Mitchell, 403 U.S. 190 (1971), held that federal, and not state, law governs property interests giving rise to federal income tax liability. Finally, United States v. Little Lake Misere Land Co., 412 U.S. 580, 604 (1973), held that a state may not retroactively modify the terms of a mineral reservation in federal land granted by the United States where the state's action is "plainly not in accord with the federal program . . . ."

Moreover, in choosing federal law, the court below ignored entirely that the " 'guiding principle' " in deciding whether to apply principles of federal common law " 'is that a *significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.*' " *Miree* v. *DeKalb County, supra* at 7, *quoting, with emphasis, Wallis* v. *Pan American Petroleum Corp., supra* at 68. As we have seen, the only federal interest the court below identified was an interest in avoiding the need to apply different state laws to lawsuits in which numerous natural gas producers sue purchasers who have contracted to sell to the United States the helium content of their gas streams—that is, some supposed interest in promoting uniformity of results and judicial economy in reaching them. That interest, however worthy it may be, is a far cry from the federal interest in nationwide uniformity and certainty with respect to such matters as federally-issued negotiable instruments as in *Clearfield* itself. In addition, the attempt to recognize the interest by applying federal law undermines the very reasons that prompted the Government to acquire Phillips' interest in the helium content of the gas stream in the way that it did. The Government meant to rely on Phillips' title, a creature of

state law. Ironically, it is through the application of the special federal common law discovered by the court below that the United States faces exposure to what the dissenting opinion recognized to be literally hundreds of millions of dollars in potential liability under the indemnity clauses of its helium conservation contracts. (Pp. 32a, 35a.)

II.

The case presents starkly this proposition of law: A contract covers the sale at a single price of two commodities. The contract is entered into freely and voluntarily, without deception or duress on either side. While the contract is in effect, a judicial decision results in subjecting the sale to rate regulation. Pursuant thereto the contract is filed with the regulatory body as the seller's rate schedule. Later a statute provides explicitly that one of the commodities covered by the contract is not subject to the agency's rate regulation.[5] Throughout the life of the contract, the collection of the contract price is not interfered with by the rate regulatory body. The proposition is that, even though the parties' bargain has thus in no way been

[5] Phillips believes that the court of appeals is altogether wrong in its construction of § 11 of the Helium Act, whether dealing with a contract that has been affected by FPC rate regulation or one that has not. Compare Panhandle Eastern Pipe Line Co. v. FPC, 359 F.2d 675 (8th Cir. 1966). Our statement of the proposition of law that the court has established assumes, contrary to that belief, that § 11 does exempt the helium component of the natural gas stream from FPC regulation even though the helium component is purchased as a part of the natural gas stream and has not yet been separated from the gas stream. Our second question presented is stated broadly enough to permit Phillips, should certiorari be granted, to argue the broader proposition as to the error in the court's reading of § 11 in case the Court wishes to reach that issue.

frustrated by the process of rate regulation, federal law releases the seller from his contractual obligation and he may recover from the purchaser a "reasonable value" for the unregulated commodity that, when added to the unaffected price of the regulated commodity, far exceeds the contract price.

That is the proposition of law that the court below has derived from the Natural Gas Act, *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954), Section 11 of the Helium Act and decisions of this Court holding that, in the court's words, 441 F.2d at 720, "there can be no deviation from the lawful rate for a regulated commodity or service," and that "the furnishing of services was an improper deviation from" rates filed with one regulatory body, the Interstate Commerce Commission.

The proposition was first suggested in the *Grounds* case, but it was muddied there because the only contracts the court described had been affected by FPC rate regulation, and this fact led it to conclude that purchasers could not rely on having paid for helium pursuant to their contracts. As the court said, the price provisions "have been superseded by FPC rate regulation," and provisions commonly found in such contracts for escalation, arbitration and renegotiation "have been largely nullified by the FPC regulations." *Id.* at 722. That is not this case. Even so, the court has ignored the difference and thus established the rule of law forecast by *Grounds.* To Phillips' argument that its case was one of an unfrustrated contract, which under Texas law is conclusive against Ashland's right to recover as under an implied contract for reasonable value, *Phoenix Lumber Co.* v. *Houston Water Co.,* 94 Tex. 456, 61 S.W. 707, 709 (1901), the court below

responded merely that "[w]e decline to reconsider *Grounds*" (p. 7a), and that the issue was decided in *Grounds* "and there would seem to be no need to consider it again other than to state that Phillips acquired the whole stream or production, but has only paid for part" (p. 14a).

On the court's view, Phillips "has only paid for part" because of the court's belief, stated in the *Texaco* opinion, "that satisfactory utility regulation does not permit a utility rate to be used to obtain a commodity which is not within the contemplation of that rate." 481 F.2d at 73.

That is a highly theoretical and unsatisfactory way of looking at the natural gas sales contracts here. The terms of those contracts have not been affected by the utility regulation to which the court refers; the "utility rate" is the price on which the parties agreed, covering the helium content as well as other components of the natural gas stream. To hold the producer to the contract price to which he agreed is very different from allowing railroads to discriminate among shippers by providing warehousing or other services to favored shippers at less than cost or value, as happened in the decisions of this Court cited by the court below. *United States* v. *Wabash R.R.*, 321 U.S. 403 (1944); *Baltimore & O.R.R.* v. *United States*, 305 U.S. 507 (1939). Indeed, since the Natural Gas Act recognizes that individual contracts may govern prices charged as long as they are not superseded by specific FPC action, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956) (contrasting the Natural Gas Act with the Interstate Commerce Act in this respect), there is nothing like the same interest in ensuring identical treatment of shippers or customers as under the Interstate Commerce Act, which commands that tariff rates govern regardless of individual contracts, *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908).

If it is to be the federal rule that an unfrustrated contract with which the FPC, the agency responsible for satisfactory utility regulation under the National Gas Act, finds no fault cannot be fully enforced merely because it has been filed with that agency and the contract price has thus become a "utility rate," it should be this Court that says so. The question is of the utmost importance now to helium sellers and purchasers and can be decided here on a manageable record, unencumbered by other considerations.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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August 1977

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCH TERM—May 10, 1977

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Circuit Judge,
The Honorable Oliver Seth, Circuit Judge,
The Honorable Robert H. McWilliams, Circuit Judge,
The Honorable James E. Barrett, Circuit Judge, and
The Honorable William E. Doyle, Circuit Judge

No. 73-1797

No. 73-1798

No. 73-1799

(D.C. No. 67-C-238)

ASHLAND OIL, INC., *Plaintiff-Appellee and Cross-Appellant,*

vs.

PHILLIPS PETROLEUM COMPANY, *Defendant-Appellant,*

vs.

UNITED STATES OF AMERICA, *Intervenor-Appellant.*

Judgment

This cause came on to be heard en banc on the consolidated record on appeal from the United States District Court for the Northern District of Oklahoma and was argued by counsel and submitted to the Court.

Upon consideration whereof, it is the judgment of this Court that the judgment of the district court is affirmed in part and reversed in part as more fully set forth in this

Court's opinion. The cause is remanded to the United States District Court for the Northern District of Oklahoma for further proceedings in light of the opinion of this Court. Each party shall bear its own costs.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

/s/ LINDA A. HALL
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 73-1797, 73-1798, 73-1799

ASHLAND OIL, INC., *Appellee, Cross-Appellant,*

v.

PHILLIPS PETROLEUM COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA, *Intervenor-Appellant.*

Appeal From The
United States District Court
For The Northern District
of Oklahoma
(D.C. # 67-C-238)

(FILED MAY 10, 1977)

On Rehearing En Banc

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Gerald Sawatzky, Wichita, Kansas (Jay W. Elston, Houston, Texas, John M. Imel, Tulsa, Oklahoma, Arloe W. Mayne, Ashland, Kentucky, W. O. Strong III, Houston, Texas, and Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, Fulbright, & Jaworski, Houston, Texas, and Martin, Logan, Moyers, Martin & Conway, Tulsa, Oklahoma, of Counsel, with him on the Brief) for Appellee-Ashland Oil, Inc.

Floyd L. France, Attorney, Department of Justice, Washington, D.C. (Peter R. Taft, Assistant Attorney General, Nathan G. Graham, United States Attorney, Hubert A. Marlow, Assistant United States Attorney, E. Edward Johnson, United States Attorney, Jon K. Sargent, Assistant United States Attorney, Edmund B. Clark, Dennis A. Dutterer, George R. Hyde, and Jacques B. Gelin, Attorneys, Department of Justice, with him on the Brief), for Intervenor-Appellant, United States of America.

Before LEWIS, Chief Judge, BREITENSTEIN, SETH, McWILLIAMS, BARRETT and DOYLE, Circuit Judges, sitting en banc.

SETH, Circuit Judge.

DOYLE, Circuit Judge, dissents. Dissenting opinion attached.

This action was brought to recover the reasonable value of helium intermixed with natural gas, extracted therefrom, and sold by the defendant Phillips to the United States. The plaintiff prevailed against the defendant and the Government as intervenor in the lower court, and they both appeal. Plaintiff also appeals, but only as to the ultimate division of the proceeds derived from the helium as ordered by the trial court.

The case was commenced in the Southern District of Texas, but transferred at defendant's request to the Northern District of Oklahoma. The complaint asserts jurisdiction based on diversity, and this ground was established. The Government intervened as plaintiff, but was realigned as a defendant.

The general description of the occurrence of helium, its characteristics, and how it became an issue is described in the several opinions hereinafter cited. It is, however, necessary to describe the contractual relationship which

existed between the defendant Phillips and the Bureau of Mines during the pertinent time period as it bears on the relationship with plaintiff.

The Helium Act (50 U.S.C. §§ 167 et seq.) was directed to the conservation of helium present in natural gas and which was being wasted by the use of the gas as fuel. It was determined that the best method to prevent this loss was to intercept the flow of helium-bearing natural gas after it had been gathered and where large volumes were being transported by pipeline to the fuel consumers, and to extract the helium therein intermingled. At these points the pipeline companies had possession of the gas stream.

The Bureau of Mines pursuant to the Helium Act entered into contracts with those in possession of the natural gas stream to purchase helium after it was extracted from the stream. The record shows that this decision to contract apparently was brought about by the inability of the Bureau to then ascertain the identity of the interest owners in the helium and to deal with them within any reasonable time. The Bureau indicates that there were some 30,000 landowners involved and several hundred lessee-producers of the gas. The production is from several states and the interest owners reside in many different states. By the contracts with the defendant and others the Bureau made possible the construction of extraction plants and soon came into possession of the helium so removed from the large gas stream. Waste of the helium was so prevented, and the purpose of the Helium Act was accomplished.

We are here concerned with the Government contract with defendant Phillips whereby the helium was physically acquired by the Government, but the ownership and compensation problems were put off to another day. The Bureau thus used by this contract the advantageous position of one in possession; postponed the inevitable legal

problems, and placed itself in the position of a defendant when the problems came before a court.

In the contract between the United States as buyer and the defendant as seller covering the purchase of helium, a specific amount was provided as compensation to defendant. The record shows that this figure was arrived at by comparison of the estimated cost to the Government had it built its own plant. No relationship of this figure to any then market values was developed in the record. This was a base price of $10.30 per Mcf and was subject to escalation under Paragraph 7.3. Paragraph 7.4 provided that in addition to such amount the buyer would pay to the seller the amounts ". . . that Seller shall pay subsequent to the date of this contract . . . to parties other than itself . . . for the acquisition of helium in the natural gas . . . or for any interest therein." It provided that such payments to qualify would have to be made with the consent of the buyer, and that "consent" included claims that ". . . have been judicially determined in favor of any claimants by any Federal Court or the highest appellate court of any state," and payments made in accordance with the findings, principles, and conclusions of such "judicial determination." Under the contract formula the defendant would pay the first $3.00 per Mcf to third parties and the Government would pay the rest. The result would be that the ultimate payment to the "owners" was to be so shared by defendant and the United States, with the United States providing an indemnification for required payments above the stated amount. There are other qualifications also.

It is obvious that this litigation wherein compensation is demanded by the interest owners of the helium was contemplated and was provided for in the contract. It was apparent that some knotty legal problems would have to be met in order to determine who the interest owners were, and to decide whether or not they had already been

compensated for the helium under the leases, the gas purchase contracts, or the Natural Gas Act. These postponed legal problems were in large part decided in the *Consolidated Helium Cases* (*Northern Natural Gas Co.* v. *Grounds*, 411 F.2d 704 (10th Cir.)), opinion by Judge Breitenstein. The basic legal relationships among the landowners, producers, and gas purchasers were there established, as was the relationship of the Natural Gas Act and the Helium Act. The controlling rules were set in the *Grounds* opinion, en banc consideration was denied, and the Supreme Court denied certiorari. We decline to reconsider *Grounds*. Further, in *Grounds* we held that ". . . the lessee-producers are entitled to the reasonable value of the contained helium." The problem of the amount of reasonable compensation, and who should pay, was not decided in Grounds, and was remanded to the trial court. The *Grounds* case is again before this court en banc and was consolidated for hearing with this case, but is not considered in this opinion.

When the matter of compensation is in issue we are faced with a somewhat different aspect of the physical and legal journey helium makes from the natural gas well to the storage facilities of the Bureau of Mines than we have considered before. The possession and interception of the gas stream, the separation of the helium therefrom, and its delivery to the United States under the contract arrangement are all still important, but the relationship of the contracting parties to those who now have been determined to own interests in the helium, and, of course, the value of the helium are the center of focus.

The position of the United States as a party herein is somewhat unusual. It filed a motion to intervene as a party plaintiff with a "Complaint in Intervention of the United States" attached. This motion was granted. The Complaint of the Government stated that the court had jurisdiction under 28 U.S.C. § 1345, cited 28 U.S.C. § 2201,

and recited the existence of the contract for the purchase of helium from Phillips, asserted that Phillips had delivered to the United States "large quantities of a helium-gas mixture" for which it had been paid "substantial sums of money." This complaint acknowledges that the plaintiff Ashland is seeking the "fair market value" of helium in the gas it sold to Phillips which was processed for helium, and the helium in turn sold to the United States under the contract referred to above. The Government further alleges that Ashland has already been paid for the helium content along with the hydrocarbons, and in any event the value of the helium content is "nominal." The complaint asserts that: "An actual controversy exists between the United States and Ashland as to whether payments between Phillips and Ashland for the gas as produced was payment for the helium content." The Government also asserts that it ". . . has a real and substantial interest in this litigation because of a provision in its contract with Phillips under which it may be under a duty to indemnify Phillips for additional payments . . . ." The Government prayed for a determination that Ashland had already been paid in full, and if not, that the fair market value of the helium was "nominal." Phillips and Ashland answered the Government's complaint. Ashland in its answer prayed for costs and general relief.

As the trial opened, the attorney for Phillips suggested that the United States be realigned as a party defendant. The court then said: "The Court will order that the style be changed to Ashland Oil and Refining Company, Plaintiff, versus Phillips Petroleum and United States of America as defendants." The findings recite that at the Government's request it was aligned as a defendant and was an intervenor. The United States participated in the trial, cross-examined witnesses, put on a witness of its own, objected to the plaintiff's findings, and submitted proposed findings. The judgment entered ran against Phillips only. The United States has fully participated in this appeal.

As indicated above, this action was brought by Ashland against the defendant Phillips to recover the reasonable *wellhead value of helium commingled with the FPC jurisdictional Gas,* but separated at defendant's plants constructed pursuant to the Helium Act and delivered as "conservation helium" to the Bureau of Mines. The suit was tried within the holding of Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.) (*The Consolidated Helium Cases,* or *Grounds*).

On this appeal Phillips devotes much of its brief and argument to contentions which were advanced in *Grounds,* there considered and rejected. It would serve no purpose to again consider these arguments. Instead it is sufficient to refer to the *Grounds* opinion for the disposition of these points.

It must be accepted that the "value" sought to be determined in this suit is basically a factual matter determined through the application of the appropriate legal doctrines. This is the value at the wellhead of the helium commingled with the natural gas there being produced.

The appellants here urge as a basic error by the trial court that it chose the wrong method in arriving at this "value." The trial court determined that there was no prevailing market value for the commingled helium, there was no free competitive market for this helium at the wellhead. The court thus used a market value for the ultimate product less the cost of beneficiation of the helium-bearing gas. The defendants urge that the trial court had sufficient evidence before it of a "market value" of the commingled helium at the wellhead.

The defendants, on their "market value" theory, put on testimony and exhibits as to transactions concerning helium-bearing gas wherein a value was ascribed to the helium component. These described events covered a broad time span and a wide geographical distribution. They involved both governmental agencies and private parties.

The trial court, in holding that there was no free competitive market, held that these transactions were of no probative value because they were not comparable. It thus concluded that the evidence failed to establish a "market price" by comparable sales. We reach the same conclusion. The transactions described by the witnesses for the defendant were too remote in time or place, and otherwise could not be considered as comparable. The testimony did not show a free market condition to establish a usable price. It is apparent that the gas stream here concerned with all its components was directed by the FPC, and was locked in by the jurisdictional gas. There was not an opportunity for free pricing at any point, nor for renegotiation of sales or the negotiation with new purchases. The helium thus had to go along with the stream. The purchasers of the stream here concerned, of course, took the position that they owned the entire contents, and were not required to pay anything more. This litigation demonstrates the character of the market, the Government domination of the market, and the strength of bare possession.

In the market price evidence of the defendant, considerable detail is presented as to purchases at the several Government helium plants. These include the plants at Exell, Otis, Cunningham, and Navajo. The helium purchases or gas purchases at these plants were made during World War II. The years which have passed since "The War" would seem to cast more than a doubt that these could possibly be comparable sales. The purchases at the Navajo plant were renegotiated after the War in 1955 and 1959, but again this cannot be a comparable transaction. The stream from the Rattlesnake production had no use as a fuel. It did have a high helium content, but nothing is developed as to any other market for this gas. The Government had for all practical purposes a monopoly on sales of helium until about 1962.

There was also testimony as to purchases of gas by the Government for the Keyes plant in 1958. The price was somewhere near $2.00 per Mcf. The production costs at this plant were about $15.50 per Mcf. The basic interest of the seller was to make the residue gas marketable by raising the BTU. The seller also assumed liability for possible additional payments to third parties.

The Otis plant was also used to upgrade the gas for fuel purposes by separating out the noncombustible portions of the stream.

Phillips also introduced evidence as to several *contracts* it had made for the payment for components of the gas production purchased. Some mentioned helium, some did not. This was a dollar price in some, and a formula as for all other components in others. These are not of particular significance, especially the casinghead gas contracts, because there was no evidence that the casinghead gas contained helium nor was ever processed for helium. As to the other Phillips contracts, there was no showing that the gas had a helium content at all (with insignificant exceptions), nor that there was ever a remote possibility of extraction, again with insignificant exceptions. Contractual provisions in such a context, even where helium was mentioned, are a meaningless gesture of the parties, and cannot be considered as evidence of comparable *sales*.

The Gas Sales Agreement between Colorado Interstate and Alamo Chemical Company (a Phillips affiliate or subsidiary) was put in evidence. This provided for the processing of gas produced in Morton County, Kansas, for the removal of helium and liquefiable hydrocarbons. The plant operator was to pay $2.00 per Mcf for helium extracted at the plant. This price was not negotiated, and it seems reasonable to assume that this was because there was litigation pending as to the obligations to pay for helium involving the parties. The contract limited the sellers' liabil-

ity on the title warranty of helium to $2.00 per Mcf. There was no contract provision for payment for hydrocarbons removed. This contract must be considered for all practical purposes as a post-litigation contract. There was also in evidence a gas exchange agreement between Phillips and Pioneer Natural Gas Company. This had a price for helium but there were other contractual considerations such as delivery of gas at other locations, and payment for only part of the helium. This agreement cannot be considered as a comparable sale.

The testimony of the defendants and evidence was thus directed to "other sales" in other places and other times. There was no substantial showing that these were "comparable sales." Evidence of "other sales" falls far short of establishing a market without comparability being clearly established.

In addition to the evidence relating to particular contract provisions, and some sales, there was expert testimony. The plaintiffs and defendants had expert witneses who testified as to what the value of helium should be. This testimony produced by both sides is of theoretical interest, presents a facet of the entire conservation program, and a description of the few independent private enterprises which tried to enter the field. No matter how interesting, this evidence is only opinion evidence, and does not establish facts. This testimony comes well down on the scale of acceptable evidence as to value. It is obvious that comparable sales or current market price is the best, and second would come the work-back method. The expert testimony of the type here presented would come somewhere after that. The experts were extremely capable, experienced persons who gave well considered and conscientious expression of their opinions, but nevertheless it remained opinion evidence on a matter of objective facts.

We thus must agree that the trial court was correct in seeking an alternative method to "market price" for establishing the reasonable value of the helium component at the wellhead. It is obvious that the comparable sales-current market price is by far the preferable method when it can be used. However, it cannot be used when the elements necessary for its proper application are lacking. The trial court thus had to resort to a work-back method or price less costs of beneficiation. This was a less desirable method but perfectly valid. Under this method a point was selected where there can be determined an established price and the cost of processing or beneficiation were deducted to move back to the place where the value must be established.

The work-back valuation is well recognized in the production and early processing of natural gas. It is commonly used, according to this record, in placing a value on feed stock for gasoline plants and related processing. There is nothing unusual about the method, it is subject to proof, and can be just as accurate as any other method, but it is more difficult to apply. There is here concerned a single plant constructed and operated for the specific purpose of extracting helium. Other costs, and other elements, can be established. This work-back method was used by the Government and the Court of Claims in making payment to the Navajos for gas supplied to the Navajo Helium Plant. *See Navajo Tribe* v. *United States,* 364 F.2d 320 (Ct.Cls.). The Government has used it on other occasions such as for Kerr-McGee royalty payment in Arizona, and under different circumstances. As to the work-back as a method for valuation, *see also* Brown, Law of Oil and Gas Leases, § 6.09; *Harding* v. *Cameron,* 220 F.Supp. 466 (W.D.Okl.); and Sneed, 25 Tax L. Rev. 641. This method to establish value has not only been used in the petroleum industry, but also in other natural resources cases. *See United States* v. *Wyoming,* 331 U.S. 440; *Black Crystal Coal Co.* v. *Garland Coal & Mining Co.,* 267 F.2d 569 (10th Cir.); and *Greer* v. *Stanolind Oil & Gas Co.,* 200 F.2d 920 (10th Cir.). *See also* the gasoline plant case, *Freeland* v.

Sun Oil Co., 277 F.2d 154 (5th Cir.), which is a common use in the industry.

Phillips argues that its right to acquire the helium component was covered by its contracts, and neither the Helium Act nor the Natural Gas Act altered these contracts. Thus there was a Fifth Amendment violation if its property was "given" to another. This court on the *Grounds* case really decided this issue and there would seem to be no need to consider it again other than to state that Phillips acquired the whole stream or production, but has only paid for part. We said in *Grounds*, "In our opinion private contract law and the principles applicable thereto are not controlling." Apparently the Government has yet to pay Phillips for much of it also.

The appellant next argues that the value less expense method was not only inapplicable, but it was improperly applied in that the proof was deficient as to certain elements, that mistakes were made, and that "trifling recognition" was given to certain evidence. We will take these references to mean that there was not substantial evidence on the several factors or elements of the method of valuation.

As to the several elements, the appellants urge that the amount used as the "return on investment" expense was not sufficient. The trial court used a figure which was part of the testimony of plaintiff's witnesses, and the method by which it was arrived at was so presented. There was no substantial contrary evidence presented at trial although on appeal appellants assert deficiencies in the method. This element however was not adequately developed by the proof and further hearing is required on this element.

The appellants also object to the allowance made by the trial court of $2.00 per Mcf for the "treatment" of the "crude" helium sold to it by Phillips (to be incurred by the Government before resale), as insufficient in that it did

not include transportation and storage. Matters of expense to be incurred subsequent to the delivery and perhaps some transportation from place of delivery to the underground storage are not shown to have been omitted from the $2.00 figure although it was denominated a "treatment" or "processing" cost. In any event, these costs are more properly attributable to the general conservation program as the duration of the storage and additional transportation are unknown factors under the record. The use of the deduction was proper and appellants have not shown that it was not supported by substantial evidence.

The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the starting figure or element of the value less expense method. This figure was testified to by the witness for the plaintiffs; this price issue was not met by defendant by way of proof. On remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting value.

The Government, in an argument again based on condemnation doctrine, urges that the helium values were *created* by its own purchase program—The Helium Conservation Program, and it should not have to pay for such values. It cites several condemnation cases on this point, and *United States* v. *Fuller*, 409 U.S. 488, which in turn cited *United States* v. *Cors*, 337 U.S. 325. This again concerned payment for something requisitioned by the Government. The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. It was a stockpiling of a commercial product. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value.

The appellants vigorously attack the use by the trial court of the value of hydrocarbon liquids produced at the helium plants in the value less expense calculations. The trial court allocated part of the plant expense to these liquids as by-products. The evidence is unclear that an increase in the production of liquids would result from the helium plant operation over what had been experienced before and over ordinary extraction plants. Appellants maintained that the increase in liquid production did not result at all from the treatment of the gas stream for helium extractions. The record shows that increased quantities of wet gas were directed to at least one of the plants, and this could make a difference in the production of liquids, but no figures were produced by defendants. Under this state of the record, we must hold that the trial court did not have adequate data to this element. Different quantities of liquids were produced at different plants, and this may result in different helium values at different plants. In view of the evidence, this was a consequence of the application of the expense element in the formula. However, further evidence on this aspect is needed.

The Government makes the point that the value of helium at the wellhead determined by the trial court exceeds the base figure for the helium-nitrogen mixture it was buying from Phillips under its contract. This may be a consequence of the decision, but there is no reason why the wellhead price should be determined by the contract price. This payment was not necessarily the "price" of the helium as other considerations were present. The contract between the appellants was negotiated between them alone, and the pricing was the evaluation by them of the entire economic consequences of the transaction including many significant factors such as its duration, warranties, and indemnities. We have described the contract at the outset of this opinion. Attention should however be directed again to the evaluations made of the legal questions, especially the title questions. The Government agreed basically to pay

Phillips for its interest in the helium and then to pay more if other interest owners established their claims. This has been done, but the price "paid" for all the interests in the helium has not yet been determined. The value here sought to be established is independent of the contract base amount, and is to be of all interests of the proper parties.

We have considered *Lippert* v. *Angle*, 211 Kan. 695, 508 P.2d 920. It states the traditional preference for comparable sales proof with which we agree, but the case does not involve the separate valuation of helium. The plant was very small, and the situation is not comparable in any way. *See also Greenshields* v. *Warren Petroleum Corp.*, 248 F.2d 61 (10th Cir.).

This appeal also raises issues as to the allowance of prejudgment interest, attorney fees, and the matter of limitations. The trial court tried the case as a federal question case, relying on our opinion in *Texaco Inc.* v. *Phillips Petroleum Co.*, 481 F.2d 70 (10th Cir.), which was thereafter reversed by the Supreme Court in *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U.S. 125. That case was concerned only with federal question jurisdiction under 28 U.S.C. § 1331 (a), and not whether state or federal law controls. The United States was not there a party. Federal jurisdiction is here conceded.

The original *Consolidated Helium Cases* were based on federal interpleader jurisdiction, and also federal law was applied. The case before us on this appeal started as a diversity suit, and the Government has asserted a claim or an interest. We have described at some length above the participation of the United States in this action, especially the initial intervention as a plaintiff expressly under 28 U.S.C. § 1345. It is apparent however that its alignment at all times was with the defendant Phillips on all important issues. No relief was sought by Ashland directly against the United States. The trial court found the ele-

ments of a condemnation or seizure by the United States, but this analysis of the manner in which helium was acquired was considered in the *Consolidated Helium Cases*, and the arguments were rejected.

As a matter apart from jurisdiction, we hold that the trial court's application of federal law was proper. The action of the Government in entering the case as a plaintiff under 28 U.S.C. § 1345 is a significant factor to be considered. The real party in interest thus appeared formally to challenge the claims of Ashland. The Government so asserted that it had a real and substantial interest in the litigation, and that an actual controversy existed between it and Ashland. It is apparent that under the contractual arrangement, the United States undertook to pay to Phillips the amounts that Phillips "shall pay" to other parties for the acquisition of helium in the natural gas above a certain figure. This is in the nature of an indemnity agreement and the contract contains qualifications and limitations not here concerned. The United States is liable for some of the additional amounts which Phillips will have to pay. The Government has thus entered the litigation to assert its own position and interest under the contract. This is initially a matter of dollars, but the Government still has possession of a large part of the helium in question, and this possession can put a somewhat different cast on the problem. These circumstances and the intervention could very well have changed the action to something other than the usual diversity suit at least for the purpose of the application of *Erie* v. *Tompkins*. This has interesting possibilities, but in any event, the circumstances direct that federal law be applied.

As indicated above, and as demonstrated in *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704 (10th Cir.), and by the record here, the Government in the several cases before this court is faced with claims made by a multitude of interest owners from many states relating to production

from Kansas, Oklahoma, and Texas. Each state has somewhat different legal doctrines relating, among other things, to the nature of interests in oil and gas, and what rights are created by oil and gas leases. With the primary liability for the dollars, and for the determination of ownership resting with the United States which obtained possession of the helium, we hold that the application of the rule expressed in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, is indicated. One of the most significant factors is the one indicated above, that is, the fact that the United States ended up with the helium. It directed, by contracting, the diversion of the helium to itself before resolving the obvious ownership problems with a multitude of claimants having diverse legal relationships to the helium, depending upon the place where the natural gas was produced and upon their contractual positions. The United States, again by contract, sought to handle these problems by providing for reimbursement to Phillips, and it may have done so. The Government nevertheless obviously has the basic responsibility and liability, as it recognizes by its intervention.

Erie v. *Tompkins* does not demand the application of state law to all diversity actions. The Court in the *Clearfield Trust* case set out an exception which was there applied to "obligations" of the United States and later expanded. The case concerned the forgery of a Government check, and a delay in notice by the Government to the bank beyond the period contemplated under state law. The Court held that rights of the Government relating to commercial paper it issues are determined by federal and not state law. The Court said that the authority to issue the check in question originated in the Constitution and statutes of the United States and was not dependent on the laws of any state. In the matter before us, the helium was acquired by the United States by contracts as authorized by federal statutes. This contracting with private enterprise was sug-

gested by statute. As stated by the Court in the cited case, "The desirability of a uniform rule is plain." *See also National Metropolitan Bank* v. *United States*, 323 U.S. 454, limited by *Bank of America* v. *Parnell*, 352 U.S. 29. The War Bond cases in state and federal courts lead to the same result. *See In re Stanley's Estate*, 80 P.2d 332 (Colo.). The Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, also indicated a considerable area to be excluded from the application of *Erie*. There an action by the FDIC was brought on a note given to a bank by the defendant, and the Court applied federal law. Also in the shareholders' liability action in *Holmberg* v. *Armbrecht*, 327 U.S. 392, in the solution of a limitations problem, the federal law was applied. Generally, *see* 59 Harv.L.Rev. 976, and 105 U.Pa.L.Rev. 797.

Under *Clearfield* when the United States seeks to litigate or seek a remedy arising from transactions it has entered into in the ordinary commercial world to carry out its program, it has been held that federal law may be applied. The federal courts can adopt a governing rule of law in such circumstances if there is no statutory direction to the contrary. *Clearfield* expressly so held. 318 U.S. at 366. *See also United States* v. *Allegheny County*, 322 U.S. 174. *Clearfield* thus indicates that the Court may apply state doctrines or parts of them as "federal law." In *United States* v. *Standard Oil Co.*, 332 U.S. 301, the Court stated that the interests of the Government and its legal relationships may be so determined. The impact of the application of state law upon the governmental interests is a factor of great weight. *See United States* v. *Mitchell*, 403 U.S. 190.

The Court in *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, considered the application of a Louisiana statute to the reservation of a mineral interest in land acquired by the United States. The factors discussed above were there treated, and the process was described as a

"choice of law" (federal or state) matter. The Court there said:

> "However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that purpose.'" [The quotation included being from Mishkin, 105 U.Pa.L.Rev. at pp. 805-6.]

The Court found further that the federal land acquisition program in *United States* v. *Little Lake Misere Land Co.* conflicted with the state law on the duration of reserved mineral interests, and said: "The choice of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default."

In the case before us, the United States was seeking to carry out the Helium Conservation Program then considered of great urgency and importance. It sought to, and did, acquire possession of the helium as directed by the legislation. The action of the Bureau of Mines was efficient and effective. In so doing it set up the contractual barriers between itself and the landowners and gas producers, and also put off the inevitable day of reckoning as to ownership. Phillips is really only a nominal party and looking at the substance, the Government has the responsibility arising from its acquisition and possession of the helium. In the face of the multitude of claimants, the variations in state law, and the *Clearfield* doctrine, the trial court was correct in not applying *Erie* v. *Tompkins*.

We find no merit to the contention of Phillips that it is entitled to a setoff for any sums previously paid to Ashland for purchases of jurisdictional gas.

The court in the *Consolidated Helium Cases* considered the ownership of the interests, title to the helium, and described how these passed down the gas stream. This de-

termination prevails. The trial court, as to the interest of the landowners-lessors, apparently followed a confiscation-condemnation theory and divided the value of the helium to be recovered from defendant Phillips equally between the lessors and lessees. Our opinion in the *Consolidated Helium Cases* requires that this division be in accordance with the lease terms, and thus the same division as applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable.

The issue of limitations has been raised together with the tolling of whatever statute may be applicable. This litigation concerning the property interests in helium and the right to compensation, considering the related cases, has been protracted and equitable considerations applicable to periods of limitation have come into play. *See deHaas* v. *Empire Petroleum Co.,* 435 F.2d 1223 (10th Cir.). We must conclude that this action has not been barred. *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538.

The trial court acted within its discretion under federal law in the allowance of prejudgment interest. *Royal Indemnity Co.* v. *United States,* 313 U.S. 289; *St. Paul Mercury Indemnity Co.* v. *United States,* 201 F.2d 57 (10th Cir.).

As to attorney fees awarded by the trial court, we are unable to find any statutory provision for them or any rule of practice which would authorize such fees. The Supreme Court has, since the trial court's decision, decided *F. D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, a Miller Act case. The opinion includes a direct and

intensive consideration of attorney fees. The Court there defines the basic rule:

> "The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'"

The Court concluded that Miller Act suits are "plain and simple commercial litigation," and the Court would not change the American Rule "in the context of everyday commercial litigation." We must hold that this litigation is not so dissimilar to Miller Act suits as to bring about a different result as to attorney fees than expressed in *F. D. Rich Co. See also Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240.

The judgment of the trial court is thus REVERSED as to the award of attorney fees, and as to the equal division between lessor and lessee of the proceeds attributed to the value of the helium, as above indicated. The judgment is also set aside as to the valuation determination with direction to hear further the matters or elements of the work-back method, referred to above, wherein there was insufficient evidence in the record.

Thus some elements have been considered in this opinion and ruled on.

On remand the trial court shall also consider whatever other elements that may be developed at further hearing, in making the value less expense or work-back determination.

Thus, we affirm the use of the work-back method of determining value and the use therein of the $2.00 figure for treatment of crude helium. We set aside the values which the trial court determined by the use of the work-back method. On remand the trial court shall give further con-

sideration to, and receive such evidence as may be admissible bearing on, (1) the proper starting value, (2) the amount chargeable to return on investment, (3) the expense properly allocable to production of hydrocarbons, and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the work-back method.

We affirm the decision of the trial court that the action is not barred by any statute of limitation and that prejudgment interest may be allowed. We reverse those portions of the judgment that (1) allow attorneys' fees and (2) divide the recovery equally between the lessors and the lessees. The lessors may recover only the amounts determined by the royalty provisions of their leases.

AFFIRMED IN PART, REVERSED IN PART, and remanded for further proceedings in the light of this opinion. Each party shall bear its own costs.

DOYLE, Circuit Judge, dissenting.

I respectfully disagree with the result of the majority opinion and, particularly, that part of it which affirms the trial court's use of the work-back theory or approach in determining a reasonable value for the commingled helium at the wellhead. My disagreement stems from the following: the work-back approach is not the preferred way to determine market value of a commodity; the starting point for determining value is wrong; and the result of its application here is an excessively high price to the government.

Both the government and Phillips Petroleum favor the comparable sales plus expert testimony method; this is the view that I prefer.

I.

WHETHER THE UNITED STATES CONTEMPLATED, AS THE MAJORITY MAINTAINS, THE PAYING OF A SUBSTANTIAL AMOUNT AT A SUBSEQUENT TIME TO LESSEE-PRODUCERS AND LANDOWNERS

I must disagree with the conclusion in the majority opinion that it was within the contemplation of the contracting parties that there would be a large amount paid to interest owners of the commingled helium at some future time. My reasons are as follows:

The Bureau of Mines had entered into contracts for the purchase of extracted helium with four companies, including Phillips, who had possession of the natural gas stream. By so doing the government avoided the necessity for identifying and dealing with all possible interest owners of the helium.

It is true that paragraph 7.4 of the contract with Phillips provided for the partial indemnification of Phillips by the United States for amounts paid subsequent to the date of the contract for the acquisition of helium in the natural gas or for any interest therein. But to raise the obligation of indemnification, the United States had to consent to the payments or the payments must have been judicially determined or they must have been made in accordance with guidelines established in judicial proceedings. In the Phillips contract indemnification came into being only after Phillips paid in excess of about $3.00 per mcf to third parties for interests in the helium.

The point that is here made is that although the government might have been aware of some indemnification possibility, it did not contemplate the kind of payments that would be necessary if the work-back method were to be followed in both the Ashland and the Helex cases.

The findings of the trial court do not support the statement in the majority opinion that it was contemplated by Phillips and the United States that there would ultimately be substantial compensation paid to the interest owners. Memoranda written by the Associate Solicitor of the Division of Mineral Resources, Department of the Interior, and by the chief helium contract negotiator for the Bureau of Mines mentioned the possibility of increased contract prices if the government required the extraction companies to give a warranty of title without some government indemnification for helium payments. But there is no evidence that the original amounts to be paid were simply a down payment. There was no prior experience of paying large sums of money for this helium. Mr. Wheeler of the Bureau of Mines testified that in building the cost model to arrive at a government negotiation position, a $2.00 per mcf amount for the commingled helium had been used because that amount reflected the government's experience in obtaining a supply of helium-bearing gas. It had never paid more than $3.00 per mcf.

The $3.00 per mcf indemnification level was not an arbitrary figure. It represented a ceiling above actual payments on previous occasions. It was an estimation of the probable maximum price that might be paid. Therefore, it is not an established fact that here would be payments in excess of $3.00 per mcf as the majority assumes. Even if some excess above $3.00 per mcf was in the minds of the negotiators of the contracts, it was not any great amount. For example, there is no evidence that it was contemplated that the price would go to $10.30. There was no evidence of a belief that it would exceed $2.00 to $3.00. If it was thought that the $2.00 to $3.00 was just the beginning, it seems likely that the extraction companies would have not left the remaining amounts up to $10.00 to $14.00 to chance. Their contemplation would in some way have been expressed.

II.

Whether the Evidence of Comparable Sales Was, As the Majority Maintains, So Lacking in Probative Value As to Require That It Be Disregarded

The reasons which the majority opinion gives for rejecting evidence of comparable sales for the purpose of establishing reasonable value include, first, that the transactions described by the witnesses which showed comparable transactions or sales were said to be too remote in time or place. The opinion goes on to say that the testimony did not show a free market condition capable of establishing a usable price.

Secondly, it is said that the helium was part of the gas stream and that this was subject to regulation by the FPC and that this also restricted the opportunities for renegotiation of sales or the negotiation "with new purchases."

The fact that the government was the dominant factor in the market should not, we submit, produce a higher price, for it only tends to show that there was no market

for the conservation program gas. Stated differently, there was no demand for it. Where that is the situation it usually means that it is not worth much. The only reason that it was worth something to the government was because the government had some interest in conserving it. It had some defense projects and space projects in which it might be used and also there is belief by some that in the future it might be of some value in creating an atmosphere for the performance of special tasks. If, as the opinion states, there is neither demand nor market for this, it would seem reasonable to adopt a pricing policy which gives to the lessee-producers such as Ashland actual cost plus a reasonable profit.

My objection to the work-back method is in its artificiality. Interestingly, it fails to start with real cost figures—its beginning is with opinion evidence given by Mr. Garwin, who was employed as manager of the Kerr-McGee plant. He testified on behalf of Ashland. His opinions were based on the price of *pure* helium sold by the government and private companies. He referred to present sales of pure helium on the private market as being $20.00. The government had charged $35.00 not because this represented a fair price. Rather, the government had no choice since it was required by law to charge that amount. The majority apparently has questions about the validity of the $20.00 starting point. It does not give a reason for its dissatisfaction. My objection is its gross excessiveness and its lack of reality.

Moving backward from a $20.00 price for pure helium to the cost of the gas purchased by the government which was not pure helium but was composed of about 50 percent helium and 50 percent nitrogen, deductions for the cost of extracting helium were made. The end result are prices ranging from $11.76 to $16.98 per mcf for the years 1963-71. The government has already paid to Phillips $10.30 per mcf which includes the cost to Phillips of building an

extraction plant. Inasmuch as the government is obligated to indemnify Phillips for all sums exceeding $3.00, this means that the difference between the $11.76 to $16.98 figures and the $3.00 indemnification threshold will in all probability be paid in addition by the government.

The trial court and the majority opinion here made no effort to isolate a rule or procedure to ascertain actual market value either from the standpoint of comparable sales or original cost or reproduction cost. It gave its full and exclusive blessing to the work-back theory. The legal objection to this is its secondary evidentiary character. It is secondary because it is called into use only if it is impossible to ascertain actual market value, from comparable sales, for example. It would have been valid to have used it for comparison purposes, that is to test and to compare the validity of the price arrived at by some other more accepted method, but this has not been done. We find them embracing it wholly and completely. This was not justifiable since there was evidence of comparable sales either at the wellhead or at the inlet of the plant.

It is more specifically objectionable because of the $20.00 starting point. If they were going to select a stage in the process and deduct costs in order to arrive at the selling price at the wellhead or at the plant inlet, they should not have started with a product which has nothing whatever to do with this case, that is they should not have attempted to discover a price for pure helium. Instead they should have looked to prices of conservation helium gas with 50 percent helium content and the remainder nitrogen, for this is the product that is sold to the government. The beauty of starting with crude conservation helium is that they had a demonstrable sale in front of them and that is the sale from Phillips to the government for the sum of $10.30 for conservation helium. From this point it would only have been necessary to deduct the costs of extraction and of transportation from the wellhead to the extraction

plant. Had they done this they would have come up with a price close to $3.00. It could be more or less. For comparison purposes they could look at the actual sales at the wellhead or at the plant inlet and this would have given them a true picture. It is worthy of note that this is exactly what Judge Brown did in the Helex cases, and his result is realistic and reliable. Judge Brown, needless to say, did not accept the work-back theory as an exclusive formula.

In the cases which have used the work-back method, I find that in each instance the court started out with a clearly supported market price and not a contrived one—a price well established in a real market for the specific commodity to be valued—or with proceeds from the actual sale of the commodity at some later point in its processing. *See Freeland* v. *Sun Oil Company,* 277 F.2d 154 (5th Cir. 1960); *Black Crystal Coal Co.* v. *Garland Coal and Mining Co.,* 267 F.2d 569 (10th Cir. 1959); *Greer* v. *Stanolind Oil and Gas Co.,* 200 F.2d 920 (10th Cir. 1952). *See also Stafos* v. *Missouri Pacific Railroad Co.,* 367 F.2d 314 (1966).

This court in *United States* v. *Sowards,* 370 F.2d 87, 91 (1966), showed that no one method need be exclusive unless it clearly establishes the price. It pointed out that the federal concept of market value is closely related to selling price on the market and that the best evidence is comparable sales even though the determination is not limited to that method. It approved the use of other data where there are no comparable sales and noted that in condemnation cases market value may also be based upon reproduction costs or capitalization of net income or an interaction of these methods together with comparable sales. It said that all of this must look to what a willing seller would sell for and a willing buyer would pay. The *Soward* decision nevertheless showed a preference for comparable sales. On the other hand, the work-back method is to be resorted to only where everything else fails.

In summary, then, it was wrong to adopt the work-back method as an exclusive one. It was wrong to start at the point where the trial court started and, of course, the result is an untenable one because it unnecessarily produces an excessive price.

What about the comparable sales which the majority opinion condemns?

We must bear in mind that the contracts entered into by the government looked to prices in 1961. The Keyes plant was cited for example and this involved purchases of gas by the government in 1958 at prices approximating $2.00 per mcf at the extraction plant inlet. The production costs were about $15.50 per mcf, but the basic interest of the seller was to make residue gas marketable by raising the BTU. This was the approach that was used in the Otis plant also. It was seeking to upgrade gas for fuel purposes.

I would submit that the fact that there was this kind of motivation does not outlaw the comparable sales evidence. Removal of helium as an aid to the heating quality of the gas ought not to render the evidence of the sale non-cogent.

The purchases of the government plants at Navajo, Exell, Otis and Cunningham are said to be out of time because they occurred in 1945 during the War. They are hardly more remote from 1961 than are the sales cited by Mr. Garwin, that is the $20.00 sales which occurred in relatively recent times. There were also purchases of helium-bearing gas for the Navajo plant in 1955, 1959, and 1962; all at about $2.00 per mcf for helium content at the plant inlet.

The gas sales agreement between Colorado Interstate and Alamo Chemical Company, a Phillips affiliate, which were at $2.00 per mcf does not appear to be out of line. The 1945 Navajo sales just referred to were determined by the Court of Claims to have a value of $2.99 per mcf.

The fact that they occurred in 1945 could be taken into account, but this is a two-edged sword because there was some actual demand for this gas during the World War II period.

I am not saying that the comparable sales should be accepted as gospel. This does not mean, however, that we should bury our heads in the sand to them. We can at least view them without fear of being contaminated. The probative value of actual sales is that they provide a more rational and realistic view of value than does some theoretical approach such as the work-back approach because these are actual demonstrations. The majority opinion does not tell us where the social or other value is in the work-back theory. As suggested before, it might be palatable if actual cost figures were used in arriving at a starting point. It is, however, lacking in palatability when the opinion of the chief witness for Ashland that $20.00 is a fair price for pure helium is accepted completely as the starting point for a work-back process.

The foregoing is important because we are dealing not with $100,000 or even a few million. Ultimately if the work-back formula is used this could mean—and we consider not only this case but its companion, the Helex II cases which have yet to be handed down but which are likely to follow this same formula—hundreds of millions of additional dollars to be paid by the government for a commodity which at best has an uncertain value now and which does not promise to have any added value in the future.

III.

Whether Today's Decision Will Result in the Government's Being Compelled to Pay an Unreasonably High Price, an Amount Which Is Beyond the Market Value of the Helium Gas

What would be the effect if the work-back method were applied to the *Helex II* cases?

Most of the helium in the United States occurs in Kansas, Oklahoma and Texas. It is not surprising, therefore, that the companion case to this present one, the so-called *Helex II* cases, arose in Kansas. The enormity of the occurrence was probably responsible for the helium conservation program in the beginning. These Kansas cases have been before this court previously. They were filed in 1964. The first one was decided at trial in 1968. It is reported in 292 F. Supp. 619. That decision was reviewed by this court in 1971. *Northern Natural Gas Co.* v. *Grounds,* 441 F.2d 704. This initial case was primarily concerned with title to the helium. Following remand, trial was had in order to determine value. As in the instant case, the government had already paid a substantial amount, about $12.00 per mcf, which purported to represent the cost of the extraction plants as well as the cost of the helium. The action was in interpleader. Its purpose was to determine the value of the helium and hence the obligation, if any, of the government or a party to pay additional amounts. At the trial evidence of comparable sales was not disimilar to the evidence offered at the *Ashland* case. There was a difference. A good deal of opinion and interpretative evidence was offered on behalf of the government. In sum, the government presented a real case in this instance—a much stronger case than was brought forth in *Ashland*. The trial court's findings were much different. Utilizing the comparable sales, and the opinion evidence, the trial court found that the value of helium at the wellhead was .60 to .70 per mcf. As a result, the government was not required

to pay any more than the $12.00 which it had paid for the gas at the well plus extraction expense including building a plant. This was because the value found was less than the $3.00 amount beyond which the government was required to indemnify. The additional amount, .60 to .70 had to be paid by the Helex companies to the lessee-producers.

If the formula approved in the present case were to be applied to the *Helex* cases there may be a far different result. I am not saying that it will. I do not know. The trial record is superior in the *Helex* cases and this could change it. On the other hand, the work-back doctrine is firmly adopted. If this present *Ashland* ruling becomes a precedent for the upcoming *Helex II* cases, the result could be a disaster to the government in that it could virtually double its cost. The price could go from $12.00 (the amount already paid and which under the *Helex* trial court's decision is the entire sum), to as high as $24.00.

The *Ashland* case is in sharp contrast. The trial court, as we already know, employed the work-back method in arriving at values of commingled helium. The prices which it adopted were $11.76 to $16.98 per mcf for the years 1963-72. This was in addition to the $10.30 already paid by the government to Phillips to cover the total cost of extraction plus cost of gas at the well. The majority opinion in this case gives restricted approval to the work-back method. It remands for additional proceedings to reconsider three factors used. In remanding the case the majority opinion has not, as we have also noted, given the trial court any guidance as to what is sought and as to how these factors are to be determined. Therefore, the outcome of the remand as it effects the values in the *Ashland* case cannot be anticipated. These values may be lower or they could just as easily be higher. Thus, both the viewpoint and the result in *Ashland* are entirely different from the approach and result in the *Helex II* cases. That is why I am apprehensive as to possible results in the *Helex* cases when

the court gets around to applying the work-back theory as now enunciated to the *Helex* cases.

We are mindful that the government has already paid the extraction companies a total of about $12.00 per mcf for the 36,500,000 mcf's of crude helium in *Helex*. This is a sum of about $438 million for helium which has been purchased and which has been stored under the conservation program. We cite it to show the magnitude of this purchase and the extent to which the government would be called upon to indemnify if the work-back method were to be applied in the *Helex II* cases. If the pattern of the present case continues, there could be additional payment of from $9.00 to $12.00 per mcf. It remains to multiply 36,500,000 mcf by the $9.00 or $12.00 addition in order to view the dismal news.

I submit that the *Helex II* cases ought to have been the precedent and the model rather than the Ashland case.

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Finally, this entire helium conservation program is affected with a public interest. As the majority notes, there is no competition to provide low prices. It is a monopoly condition and the determination of reasonableness of prices has devolved on the courts. The court should, of course, see to it that the companies involved in the production of the helium receive fair compensation. Fair compensation does not mean that the participants should receive profits of the possible magnitude indicated here.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 73-1797, 73-1798, 73-1799

ASHLAND OIL, INC., *Plaintiff*

v.

PHILLIPS PETROLEUM COMPANY, *Defendant.*

and

UNITED STATES OF AMERICA, *Intervenor.*

(FILED JANUARY 27, 1975.)

Richard B. McDermott, Tulsa, Oklahoma (Lloyd G. Minter and Don L. Jemison, Bartlesville, Oklahoma, with him on the Brief), for Appellant.

Gerald Sawatzky, Wichita, Kansas (Stanley G. Andeel and Charles E. Cole, Jr., Wichita, Kansas, Jay W. Elston, Houston, Texas, John M. Imel, Tulsa, Oklahoma, Arloe W. Mayne, Ashland, Kentucky, J. M. O'Loughlin, Houston, Texas; Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, Fulbright & Crooker, Houston, Texas, and Martin, Logan, Moyers, Martin & Conway, Tulsa, Oklahoma, of Counsel, with him on the Brief), for Appellee.

Jacques B. Gelin, Attorney, Department of Justice, Washington, D.C. (Wallace H. Johnson, Assistant Attorney General, Nathan G. Graham, United States Attorney, Hubert A. Marlow, Assistant United States Attorney, Edmund B. Clark, Floyd L. France, and Dennis A. Dutterer, Attorneys, Department of Justice, with him on the Brief), for Intervenor-Appellant.

Before BREITENSTEIN, SETH and DOYLE, Circuit Judges.

SETH, Circuit Judge.

This action was brought to recover the reasonable value of helium intermixed with natural gas, extracted therefrom and sold by the defendant Phillips to the United States. The plaintiff prevailed against the defendant and the Government as intervenor in the lower court, and they both appeal. Plaintiff also appeals, but only as to the ultimate division of the proceeds derived from the helium as ordered by the trial court.

The case was commenced in the Southern District of Texas, but transferred at defendant's request to the Northern District of Oklahoma. The complaint asserts jurisdiction based on diversity and this ground was established. The Government intervened as plaintiff, but was realigned as a defendant.

The general description of the occurrence of helium, its characteristics, and how it became an issue is described in the several opinions hereinafter cited. It is, however, necessary to describe the contractual relationship which existed between the defendant Phillips and the Bureau of Mines during the pertinent time period as it bears on the relationship with plaintiff.

The Helium Act (50 U.S.C. §§ 167 et seq.) was directed to the conservation of helium present in natural gas and which was being wasted by the use of the gas as fuel. It was determined that the best method to prevent this loss was to intercept the flow of helium-bearing natural gas after it had been gathered and where large volumes were being transported by pipeline to the fuel consumers, and to extract the helium therein intermingled. At these points the pipeline companies had possession of the gas stream.

The Bureau of Mines pursuant to the Helium Act entered into contracts with those in possession of the natural

gas stream to purchase helium after it was extracted from the stream. The record shows that this decision to contract apparently was brought about by the inability of the Bureau to then ascertain the identity of the interest owners in the helium and to deal with them within any reasonable time. The Bureau indicates that there were some 30,000 landowners involved and several hundred lessee-producers of the gas. The production is from several states and the interest owners reside in many different states. By the contracts with the defendant and others the Bureau made possible the construction of extraction plants and soon came into possession of the helium so removed from the large gas stream. Waste of the helium was so prevented, and the purpose of the Helium Act was accomplished.

By the contract with defendant Phillips the helium was physically acquired, but the ownership and compensation problems were put off to another day. The Bureau thus used by this contract the advantageous position of one in possession; postponed the inevitable legal problems, and placed itself in the position of a defendant when the problems came before a court.

In the contract between the United States as buyer and the defendant as seller covering the purchase of helium, a specific amount was provided as the sales price; further, in paragraph 7.4 it was provided that in addition to such amount the buyer would pay to the seller the amounts ". . . that Seller shall pay subsequent to the date of this contract . . . to parties other than itself . . . for the acquisition of helium in the natural gas . . . or for any interest therein." It provided that such payments to qualify would have to be made with the consent of the buyer, and that "consent" included claims that ". . . have been judicially determined in favor of any claimants by any Federal Court or the highest appellate court of any state," and payments made in accordance with the findings, principles, and conclusions of such "judicial determination." Under the con-

tract formula the defendant would pay the first $3.00 per Mcf to third parties and the Government would pay the rest. The result would be that the ultimate payment to the "owners" was to be so shared by defendant and the United States.

It is obvious that litigation such as this wherein compensation is demanded by the interest owners of the helium was contemplated and was provided for in the contract. It was apparent that some knotty legal problems would have to be met in order to determine who the interest owners were, and to decide whether or not they had already been compensated for the helium under the leases, the gas purchase contracts, or the Natural Gas Act. These postponed legal problems were in large part considered in the *Consolidated Helium Cases* (Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.)). The basic legal relationships among the landowners, producers, and gas purchasers were established, as was the relationship of the Natural Gas Act and the Helium Act. The problem of reasonable compensation, and who should pay, was not decided and was remanded to the trial court. These were decided under federal law in a federal interpleader action.

When the matter of compensation is in issue we are faced with a different segment of the physical and legal journey helium makes from the natural gas well to the storage facilities of the Bureau of Mines than we have considered before. The possession and interception of the gas stream, the separation of the helium therefrom, and its delivery to the United States under the contract arrangement all become important. The relationship of the contracting parties to those who now have been determined to own interests in the helium, and the values of the helium are the center of focus.

The position of the United States as a party herein is somewhat unusual. It filed a motion to intervene as a party plaintiff with a "Complaint in Intervention of the United

States" attached. This motion was granted. The complaint of the Government stated that the court had jurisdiction under 28 U.S.C. § 1345, recited the existence of the contract for the purchase of helium from Phillips, asserted that Phillips had delivered to the United States "large quantities of a helium-gas mixture" for which it had been paid "substantial sums of money." This complaint acknowledges that the plaintiff Ashland is seeking "fair market value" of helium in the gas it sold to Phillips which was processed for helium, and the helium sold to the United States under the contract referred to. The Government further alleges that Ashland has already been paid for the helium content along with the hydrocarbons, and in any event the value of the helium content is "nominal." The complaint asserts that: "An actual controversy exists between the United States and Ashland as to whether payments between Phillips and Ashland for the gas as produced was payment for the helium content." The Government also asserts that it ". . . has a real and substantial interest in this litigation because of a provision in its contract with Phillips under which it may be under a duty to indemnify Phillips for additional payments . . ." The Government prayed for a determination that Ashland had already been paid in full, and if not, that the fair market value of the helium was "nominal." Phillips and Ashland answered the Government's complaint. Ashland in its answer prayed for costs and general relief.

As the trial opened, the attorney for Phillips suggested that the United States be realigned as a party defendant. The court then said: "The Court will order that the style be changed to Ashland Oil and Refining Company, Plaintiff, versus Phillips Petroleum and United States of America as defendants." The findings recite that at the Government's request, it was aligned as a defendant and was an intervenor. The United States participated in the trial, cross-examined witnesses, put on a witness of its own, ob-

jected to the plaintiff's findings, and submitted proposed findings. The judgment entered ran against Phillips only. The United States has fully participated in this appeal.

As indicated above, this action was brought against the defendant Phillips to recover the reasonable wellhead value of helium commingled with the FPC jurisdictional gas, but separated at defendant's plants constructed pursuant to the Helium Act and delivered to the Bureau of Mines. The contract between the defendant and the Bureau of Mines is considered above. The suit was tried within the holding of Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.) (*The Consolidated Helium Cases*, or *Grounds*).

On this appeal Phillips devotes much of its brief and argument to contentions which were advanced in *Grounds*, there considered and rejected. It would serve no purpose to again treat these arguments in this opinion. Instead it is sufficient to refer to the *Grounds* opinion for the disposition of these points.

The *Grounds* case was remanded for a determination of the reasonable value of the helium in issue, the other points having been decided, and the basic legal relationships determined. Thus here we are faced with the value problem, and some related issues which have not come from the remanded case but from another direction.

It must be accepted that the "value" sought to be determined in this suit is a factual matter arrived at through the application of the proper legal doctrines. The appellants do not attempt to separate the factual issues from the legal issues in the application of Rule 52.

The appellants urge as a basic error on the part of the trial court that it chose the wrong method in arriving at a valuation. The defendants put on extensive testimony and exhibits as to transactions concerning helium-bearing gas wherein a value was ascribed to the helium component on a market value theory. These events covered a broad

time and geographical space, and involved both governmental agencies and private parties. The trial court held that there was no free competitive market, and inferentially held that these transactions were of no probative value because they were not comparable. Instead the trial court used a different valuation method—a value less expense of beneficiation.

The appellants urge that the use of such a value less expense method was error in the face of their market value evidence. The Government on this point cites a number of condemnation cases, including United States v. Miller, 317 U.S. 369; United States v. Sowards, 370 F.2d 87 (10th Cir.); and United States v. Featherston, 325 F.2d 539 (10th Cir.). The record discloses that the rejection by the trial court of the evidence of "sales" was well within its discretion. As indicated above, the transactions which had an arguable similarity were very remote in time or place, and those closer in time and space had little or no similarity. As a matter of law, the trial court was within its discretion, in view of the evidence before it, in selecting the value less expense formula as a secondary method. There was ample evidence before it on the elements of the method.

The appellants also argue that the value less expense method was improperly applied in that the proof was deficient as to certain elements, that mistakes were made, and that "trifling recognition" was given to certain evidence. We will take these references to mean that there was not substantial evidence on the several factors or elements of the method of valuation.

As to the several elements, the appellants urge that the amount used as the "return on investment" expense was not sufficient. The trial court used a figure which was part of the testimony of plaintiff's witnesses, and the method by which it was arrived at was so presented. There was no

substantial contrary evidence presented at trial although on appeal appellants assert deficiencies in the method. This was a factual determination and there was substantial evidence to support the trial court's findings although we might not have reached the same result.

The appellants also object to the allowance made by the trial court of $2.00 per Mcf for the "treatment" of the "crude" helium sold to it by Phillips, but to be incurred by the Government before resale by it, as insufficient in that it did not include transportation and storage. Matters of expense to be incurred subsequent to the delivery and perhaps some transportation from place of delivery to the underground storage are not shown to have been omitted from the $2.00 figure although it was denominated a "treatment" or "processing" cost. In any event, these costs are more properly attributable to the general conservation program as the duration of the storage and additional transportation are unknown factors under the record. The use of the deduction was proper and appellants have not shown that it was not supported by substantial evidence.

The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the "value" element of the value less expense method. This figure was testified to by the witness for the plaintiffs, and the amount is well within the Bureau of Mines Yearbook figures for the several years in issue. The evidence supports this figure also, and this price issue was not directly met by defendant by way of proof.

The Government, in an argument again based on condemnation doctrine, urges that the helium values were *created* by its own purchase program—The Helium Conservation Program, and it should not have to pay for such values. It cites several condemnation cases on this point and United States v. Fuller, 409 U.S. 488, which in turn cited United States v. Cors, 337 U.S. 325. This again con-

cerned payment for something requisitioned by the Government. The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value.

The appellants vigorously attack the use by the trial court of the value of hydrocarbon liquids produced at the helium plants in the value less expense calculations. The trial court, on the basis of extensive testimony, and also on exhibits consisting of letters from Phillips, allocated part of the plant expense to these liquids as by-products. The evidence is clear that an increase in the production of liquids would result from the helium plant operation. This would be an increase over what had been experienced before and over ordinary extraction plants. The witnesses calculated the amount to be so used in the formula. This was not contradicted in amount by appellants, as instead they maintained that the increase in liquid production did not result at all from the treatment of the gas stream for helium extraction. The record shows that increased quantities of wet gas were directed to at least one of the plants and this could make a difference in the production of liquids, but no figures were produced by defendants. Instead the defendants maintained in the face of overwhelming evidence to the contrary that the helium extraction made no difference. Under this state of the record, we must hold that the trial court was justified in using the figures it did as they were supported by substantial evidence. Different quantities of liquids were produced at different plants, and this resulted in different helium values at different plants. This, in view of the evidence, was a consequence of the application of the expense element in the

formula. Evidence on this issue was presented by the parties as indicated above, and although the result may not have been as precise as it could have been, it is again a factor supported by substantial evidence.

The Government makes the point that the value of helium at the wellhead determined by the trial court exceeds the base price for the helium-nitrogen mixture it was buying from Phillips under its contract. This is the consequence of the decision, but there is no reason why the wellhead price should be determined by the contract price. The contract between the appellants was negotiated between them alone, and the pricing was the evaluation by them of the entire economic consequences flowing from the contract including many significant factors such as its duration, warranties, and indemnities. We have described the contract at the outset of this opinion. Attention should however be directed again to the evaluations made of the legal questions, especially the title questions. The Government agreed basically to pay Phillips for its interest in the helium and then to pay more if other interest owners established their claims. Thus the price "paid" for all the interests in the helium has not yet been determined. The considerations leading to this method were described above. The value here sought to be established is independent of the contract base amount and covers all interests of the proper parties.

We have considered Lippert v. Angle, 211 Kan. 695, 508 P.2d 920. It states the traditional preference for comparable sales proof. The case does not involve the separate valuation of helium. The plant was very small, and the situation is not comparable in any way. *See also* Greenshields v. Warren Petroleum Corp., 248 F.2d 61 (10th Cir.).

This appeal also raises issues as to the allowance of prejudgment interest, attorney fees, and the matter of limitations. The trial court tried the case as a federal

question case, relying on our opinion in Texaco Inc. v. Phillips Petroleum Co., 481 F.2d 70 (10th Cir.), which was thereafter reversed by the Supreme Court in Phillips Petroleum Co. v. Texaco Inc., 415 U.S. 125.

The original *Consolidated Helium Cases* were based on federal interpleader jurisdiction, and also federal law was applied. The case before us on this appeal started as a diversity suit. We have described at some length above the participation of the United States in this action, especially the initial intervention as a plaintiff expressly under 28 U.S.C. § 1345. It is apparent however that its alignment at all times was with the defendant Phillips on all important issues. No relief was sought by Ashland directly against the United States. The trial court found the elements of a condemnation or seizure by the United States, but this analysis of the manner in which helium was acquired was considered in the *Consolidated Helium Cases*, and the arguments were rejected.

As a matter apart from jurisdiction, we hold that the trial court's application of federal law was proper. The action of the Government in entering the case as a plaintiff under 28 U.S.C. § 1345 is a significant factor to be considered. The real party in interest thus appeared formally to challenge the claims of Ashland. The Government so asserted that it had a real and substantial interest in the litigation, and that an actual controversy existed between it and Ashland. It is apparent that under the contractual arrangement, the United States is to pay to Phillips the amounts that Phillips "shall pay" to other parties for the acquisition of helium in the natural gas. Thus the United States is liable for the additional amounts which Phillips will have to pay by reason of this action. The Government has here entered the litigation to assert its own position and interest. This is initially a matter of dollars, but the Government still has possession of a large part of the helium in question, and this possession can put a some-

what different cast on the problem. These circumstances and the intervention could very well have changed the action to something other than the usual diversity suit at least for the purpose of the application of *Erie* v. *Tompkins*. This has interesting possibilities, but in any event, the circumstances direct that federal law be applied.

As indicated above, and as demonstrated in Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.), and by the record here, the Government is ultimately faced with claims made by many thousands of interest owners from many states relating to production from Kansas, Oklahoma, and Texas. Each state has different legal doctrines relating, among other things, to the nature of interests in oil and gas, and what rights are created by oil and gas leases. With the primary liability for the dollars, and for the determination of ownership resting with the United States which obtained possession of the helium, we hold that the application of the rule expressed in Clearfield Trust Co. v. United States, 318 U.S. 363, is indicated. One of the most significant factors is the one indicated above, that is, the fact that the United States ended up with the helium. It directed, by contracting, the diversion of the helium to itself before resolving the obvious ownership problems with a multitude of claimants having diverse legal relationships to the helium, depending upon the place where the natural gas was produced and upon their contractual positions. The United States, again by contract, sought to handle these problems by providing for reimbursement to Phillips, and it may have done so. The Government nevertheless obviously has the basic responsibility and liability, as it recognizes by its intervention.

Erie v. *Tompkins* does not demand the application of state law to all diversity actions. The Court in the *Clearfield Trust* case set out an exception which was there applied to "obligations" of the United States and later expanded. The case concerned the forgery of a Government

check, and a delay in notice by the Government to the bank beyond the period contemplated under state law. The Court held that rights of the Government relating to commercial paper it issues are determined by federal and not state law. The Court said that the authority to issue the check in question originated in the Constitution and statutes of the United States and was not dependent on the laws of any state. In the matter before us, the helium was acquired by the United States by contracts as authorized by federal statutes. This contracting with private enterprise was suggested by statute. As stated by the Court in the cited case, "The desirability of a uniform rule is plain." *See also* National Metropolitan Bank v. United States, 323 U.S. 454, limited by Bank of America v. Parnell, 352 U.S. 29. The War Bond cases in state and federal courts lead to the same result. *See* In re Stanley's Estate, 80 P.2d 332 (Colo.). The Court in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, also indicated a considerable area to be omitted from the application of *Erie*. There an action by the FDIC was brought on a note given to a bank by the defendant, and the Court applied federal law. Also in the shareholders' liability action in Holmberg v. Armbrecht, 327 U.S. 392, in the solution of a limitations problem, the federal law was applied. Generally, *see* 59 Harv. L. Rev. 976, and 105 U.Pa.L.Rev. 797.

Under *Clearfield* when the United States seeks to litigate or seek a remedy arising from transactions it has entered into in the ordinary commercial world to carry out its program, it has been held that federal law may be applied. The federal courts can adopt a governing rule of law in such circumstances if there is no statutory direction to the contrary. *Clearfield* expressly so held. 318 U.S. at 366. *See also* United States v. Allegheny County, 322 U.S. 174. *Clearfield* thus indicates that the Court may apply state doctrines or parts of them as "federal law." In United States v. Standard Oil Co., 332 U.S. 301, the Court

stated that the interests of the Government and its legal relationships may be so determined. The impact of the application of state law upon the governmental interests is a factor of great weight. *See* United States v. Mitchell, 402 U.S. 190.

The Court in United States v. Little Lake Misere Land Co., 412 U.S. 580, considered the application of a Louisiana statute to the reservation of a mineral interest in land acquired by the United States. The factors discussed above were there treated, and the process was described as a "choice of law" (federal or state) matter. The Court there said:

> "However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that purpose.' " [The quotation included being from Mishkin, 105 U.Pa.L.Rev. at pp. 805-6.]

The Court found further that the federal land acquisition program in *United States* v. *Little Lake Misere Land Co.* conflicted with the state law on the duration of reserved mineral interests, and said: "The choice of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default."

In the case before us, the United States was seeking to carry out the Helium Conservation Program then considered of great urgency and importance. It sought to, and did, acquire possession of the helium as directed by the legislation. The action of the Bureau of Mines was effective. In so doing it set up the contractual walls between itself and the land owners and gas producers, and put off the inevitable day of reckoning as to ownership. Phillips is really only a nominal party and looking at the substance,

the Government has the responsibility arising from its acquisition and possession of the helium. In the face of the multitude of claimants, the variations in state law, and the Clearfield doctrine, the trial court was correct in not applying *Erie* v. *Tompkins*.

We find no merit to the contention of Phillips that it is entitled to a setoff for any sums previously paid to Ashland for purchases of jurisdictional gas.

The court in the *Consolidated Helium Cases* considered the ownership of the interests, title to the helium, and described how these passed down the gas stream. This determination prevails. The trial court, as to the interest of the landowners-lessors, apparently followed a confiscation-condemnation theory and divided the value of the helium to be recovered from defendant Phillips equally between the lessors and lessees. Our opinion in the *Consolidated Helium Cases* requires that this division be in accordance with the lease terms, and thus the same division as applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable.

The issue of limitations has been raised together with the tolling of whatever statute may be applicable. This litigation concerning the property interests in helium and the right to compensation, considering the related cases, has been protracted and equitable considerations applicable to periods of limitation have come into play. *See* deHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir.). We must conclude that this action has not been barred. American Pipe & Construction Co. v. Utah, 414 U.S. 538.

The trial court acted within its discretion under federal law in the allowance of prejudgment interest. Royal Indemnity Co. v. United States, 313 U.S. 289; St. Paul Mercury Indemnity Co. v. United States, 201 F.2d 57 (10th Cir.).

As to attorney fees awarded by the trial court, we are unable to find any statutory provision for them or any rule of practice which would authorize such fees. The Supreme Court has, since the trial court's decision, decided F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, a Miller Act case. The opinion includes a direct and intensive consideration of attorneys fees. The Court there defines the basic rule:

> "The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not ordinarily recoverable in the absence of a statute of enforceable contract providing therefor.'"

The Court concluded that Miller Act suits are "plain and simple commercial litigation," and the Court would not change the American Rule "in the context of everyday commercial litigation." We must hold that this litigation is not so dissimilar to Miller Act suits as to bring about a different result as to attorney fees than expressed in *F. D. Rich Co.*

The judgment of the trial court is thus REVERSED as to the award of attorney fees, and as to the equal division between lessor and lessee of the proceeds attributed to the value of the helium, as above indicated. The judgment is AFFIRMED in all other respects.

UNITED STATES DISTRICT COURT, N. D. OKLAHOMA.

No. 67-C-238.

ASHLAND OIL, INC., *Plaintiff*

v.

PHILLIPS PETROLEUM COMPANY, *Defendant.*

and

UNITED STATES OF AMERICA, *Intervenor.*

Aug. 13, 1973.

As Corrected Aug. 31, 1973.

Opinion

BOHANNON, District Judge.

1 This action was initially instituted in the United States District Court for the Southern District of Texas, and was later, by proper proceedings transferred to this Court for trial and disposition. Ashland Oil and Refining Company (hereinafter referred to as Ashland) originally claimed the right to recover moneys from Phillips Petroleum Company (hereinafter referred to as Phillips) representing an alleged deficiency in payments for sale of natural gas under the jurisdiction of the Federal Power Commission. Ashland also asserted claims against Phillips to be paid for helium contained in the jurisdictional mass of natural gas, and which was extracted from the natural gas stream by Phillips under contract with the United States of America through the Department of Interior, Bureau of Mines.

The Court has diversity jurisdiction and federal question jurisdiction, 28 U.S.C.A. §§ 1331(a) and 1332.

Ashland abandoned its claim against Phillips for deficiency payments for sale of natural gas under the juris-

diction of the Federal Power Commission by reason of proceedings before the Federal Power Commission, and an appeal from its order (Ashland Oil and Refining Company v. FPC, 421 F.2d 17, 6th C.A.). Consequently, the only claim remaining for trial and determination by this Court is Ashland's claim for recovery of the reasonable value of helium contained in the natural as stream delivered by Ashland to Phillips.

Plaintiff Ashland acquired all of the interests of United Producing Company which had entered into a contract with Phillips Petroleum Company on November 8, 1945 (amended Oct. 1, 1950 & June 27, 1956) providing for the sale of natural gas from 15 wells located in Sherman County, Texas. These same parties entered into another gas purchase agreement on April 15, 1953, (amended June 27, 1956) providing for the sale of natural gas from three wells in Hansford County, Texas. These agreements were properly filed with the Federal Power Commission as provided by law and rate schedules were fixed for the sale of said gas. These filings were required under the Natural Gas Act (15 U.S.C. § 717 et seq.) because Ashland's deliveries to Phillips constituted sales of natural gas for resale in interstate commerce. Ashland succeeded to all the rights and interest of United Producing Company. All of the wells above referred to are subject to the contract between Ashland, as successor to United Producing Company, and Phillips Petroleum Company, and Phillips Petroleum Company extracted helium which was contained in the natural gas stream as delivered by Ashland to Phillips.

Ashland's contention is that the title to the helium in the contained natural gas did not pass to Phillips under the gas purchase contracts and if and when Phillips elected to extract the helium from the natural gas stream, plaintiff Ashland was entitled to payment therefor from Phillips

for the reasonable value of such helium less certain costs of extraction, and other deductions hereafter referred to.

The defendant contends that when it purchased the gas stream from Ashland, it purchased all of the elements thereof including the helium, and inasmuch as Phillips paid Ashland the Federal Power Commission rate for the gas delivered to Phillips, Phillips became the owner of the entire stream, including the helium, and therefore, is not liable in any sum to Ashland for the helium extracted. Further, Phillips presents the defense of Statute of Limitations claiming that if liable, they are liable only for the helium extracted from the natural gas for two years prior to the filing of this action and thereafter; further Phillips claims that by reason of payment to Ashland for the natural gas, plaintiff is barred by the defenses of accounts stated, accord and satisfaction, and to require payment now would be a violation of the Fifth Amendment to the Constitution of the United States.

The United States of America by Order of the Court was realigned as a party defendant.

Findings

1. Helium is an unusual element; it is a gas which is inert and noncombustible and is the second lightest element known. Helium is so inert that it will not chemically react or combine with other elements and thus remains as helium forever. It is tasteless, colorless, odorless and invisible. For a more complete description of helium, its unusual characteristics, its uses, and where found, etc., see Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10 C.A.) and in the Opinion of District Judge Wesley E. Brown, 292 F.Supp. 619 (D.C.Kan.).

2. The United States of America, through the Department of Interior and the Bureau of Mines of the Department recognizing the need for the conservation of this rare

material and its scarcity, and its need for defense purposes and other important uses, Congress enacted the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.) authorizing the United States to enter into a program of conservation of helium for future use; under this program, private companies negotiated contracts with the United States of America through the Department of Interior, Bureau of Mines, to construct plants for the extraction of helium from natural gas streams, then being produced from the Hugoton-Panhandle area; otherwise, this valuable material would be lost at the burner tip of the ultimate user of the gas and discharged into the air as residue.

3. Prior to 1961, the United States Government, with minor exceptions for a short time, was the sole extractor and source of commercial helium. It controlled and fixed the price of all wholesale sales of helium.

4. Pursuant to the authority granted by Congress, the United States entered into five long-term helium purchase contracts with four companies, one of which was Phillips Petroleum Company, which contracted on November 13, 1961, with the United States to sell a helium gas mixture from two plants it proposed to build, the Sherman Helium Plant and the Dumas Helium Plant. These plants were constructed so as to extract for delivery and sale to the government a helium gas mixture (crude helium) which was to consist of at least 50% helium under the contract requirements, the remainder being essentially nitrogen. Under this contract, the United States agreed to pay a base price of $10.30 per m. c. f. (thousand cubic feet) of contained helium in the crude product, which price was subject to escalation in accordance with the contract. The base price was also subject to escalation in the event Phillips was required to pay third parties "for the acquisition of helium."[1] Specifically, under the contract between the United

[1] "In addition to all other amounts payable under this contract Buyer shall pay to Seller all amounts, except as hereinafter provided, that Seller shall pay subsequent to the date of this contract, directly or through an affiliated company, to parties other than itself or an affiliated company for the acquisition of helium in the natural gas, as defined herein, or for any interest in such helium. Any such payment to qualify for inclusion hereunder shall be made only with the consent of Buyer; and for the purposes of this paragraph 7.4 Buyer shall be deemed to have consented to any and all such payments in satisfaction or settlement of any claims to helium in the natural gas, as defined herein, or to any interest in such helium that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state. Further, Buyer shall be deemed to have consented to any and all such payments under circumstances similar to any such judicially determined claim if such payments are made generally in accordance with the findings, principles, and conclusions of any such judicial determination. The amounts that Buyer shall be required to pay to Seller in accordance with this paragraph shall not include an amount to be calculated applicable to each such acquisition equal to twenty-nine (29) per cent of the weighted average of part two of the unit price or unit prices in effect during the time covered by such acquisition multiplied by the volume in MCF of helium in the natural gas, as defined herein, covered by such acquisition."

States and Phillips, producers of commingled helium such as Ashland and the mineral or royalty owners, being third parties, and if they were entitled to recover from Phillips the reasonable value of the helium produced from the commingled gas Phillips was required to pay under paragraph 7.4 of the contract, part 2 of the unit price only approximately $3.00 per m. c. f. and the United States under the contract was required to reimburse or indemnify Phillips for any excess of $3.00 per m. c. f. which Phillips was required to pay. This was an important part of the contract because it indemnified Phillips against required payments to third parties of the amount in excess of $3.00 per m. c. f. and thus gave the United States the right to purchase this helium for a lower sum than, no doubt, otherwise would have been required.

5. The United States took delivery of the helium gas mixture from Phillips and transported it through its own pipeline to storage in government-owned storage facilities at Cliffside Field near Amarillo, Texas. From there it can be withdrawn as needed, and purified to grade A helium (99.995% pure helium) in government-owned plants at approximately $2.00 per m.c.f. helium.

6. Under the contracts the government agreed to take all of the helium produced up to certain amounts, and the government sold grade A helium at wholesale F.O.B. its helium plants for $35.00 per m.c.f. and has done so since the fall of 1961. All federal departments and agencies were required to purchase their helium needs from the United States at this price. The Bureau of Mines has the statutory authority and responsibility to fix the price at whatever level is necessary to pay for costs associated with the helium conservation program, including any additional payments which may be required to be paid by the United States as a result of this case.

7. Beginning in 1961, several private helium plants have been built to sell pure helium in the private commercial market. Although the government price for its helium has remained at $35.00 per m. c. f., the prices for which helium has sold on the private market from 1963 through 1972 have ranged from $35.00 to approximately $20.00 per m. c. f. Such prices are wholesale prices and the only market prices for sale of helium in the United States during the period in question.

8. The Court finds the fair and reasonable value of grade A helium during the periods here involved was $20.00 per m. c. f.

9. Recognizing the benefit to United States and the importance of paragraph 7.4 of the United States-Phillips helium contract, the Associate Solicitor of the Division of Mineral Resources of the Department of the Interior, and

who approved the contract provision, correctly described it as an escalation in price:

> "This provision in effect provides for escalation in price when the cost of the raw material increases." (Pls. Ex. 39, p. 3)

10. By reason of the above escalation provision in the contract, the United States was able to obtain a base price substantially lower than would otherwise have been possible.

11. There was no known wellhead price for the helium gas in the gas stream, and it was and is impractical and uneconomical to attempt to extract the helium gas at the wellhead. This can only be done economically through large plants with large volumes of gas to process.

12. The gas stream delivered by Ashland to Phillips contained all of the natural gas liquids, such as butane, propane and pentanes plus, which Phillips extracts and did extract from the feed gas and markets these gases in liquid form. Because these rich liquids are in concentrated form (about 10% of the volume of the total feed as stream), Phillips has been able to extract and market substantial additional quantities of such liquids, above and beyond what its existing gasoline plants would be able to extract at a substantial savings in cost. These additional liquids are in substance a byproduct of the helium plant operation.

13. Experts who testified in the trial of this case estimate that the Texas Panhandle, Southwestern Kansas and Western Oklahoma constitute 99% of the free world's known commercial reserves of helium. This area is known as the Hugoton Field, and Ashland wells which deliver gas to Phillips are in this field.

14. To arrive at the reasonable wellhead value of Ashland's helium delivered to Phillips, there should be de-

ducted from the value these costs incurred by Phillips in extracting and delivering the helium and also the cost of purification. In determining these costs, the total costs of the helium plant itself should be credited and reduced by a fair allocation of a portion of such costs to the incremental, or additional liquids, which the helium plant generates. This can equitably be done by calculating a fair share of the incremental benefits accruing to Phillips in its natural gas liquids operation as a direct result of the helium plant operation. Failure to assign a portion of helium plant costs to the incremental liquids operation would inequitably burden the helium plant with substantial costs which are incurred and which result in the production of the incremental liquids.

15. After allowing for the following deductions, the Court finds that the reasonable value of the helium delivered by Ashland to Phillips is shown in the following table. The deductions referred to include:

(a) All helium plant costs, including a 10% rate of return to Phillips on its stockholder equity;

(b) The incremental liquids benefit which should be applied to reduce costs of the helium plant;

(c) $2.00 per m. c. f. for purification.

16. The Court finds and is of the opinion that the following table shows the reasonable cost of extracting the helium, the reasonable value of helium on a yearly basis from the Ashland gas delivered to Phillips and further shows the volume of helium per m. c. f. extracted by Phillips for the ten year period in question and the total value thereof; likewise it shows the interest computed at 6% per annum for the total recovery of helium delivered by Ashland and recovered by Phillips and the total amount of money judgment plaintiff is entitled to recover:

Reasonable Value Calculations

	A Helium Plant Costs (Plt's Ex. 61 & 62, line 10)	B Liquid Benefit Credit (Plt's Ex. 61 & 62, line 12)	C Net Helium Cost (Columns [a] less [b])	D Minimum Value for Crude Helium $20.00 Grade A Helium Value less $2.00/mcf Purification Cost	E Reasonable Value of Helium Delivered by Ashland to Phillips (Columns [d] less [c])
			SHERMAN HELIUM PLANT		
1963	$4.82	$1.01	$3.81	$18.00	$14.19
1964	3.53	.10	3.43	18.00	14.57
1965	4.06	.27	3.79	18.00	14.21
1966	4.09	.45	3.64	18.00	14.36
1967	4.94	1.06	3.88	18.00	14.12
1968	4.22	1.16	3.06	18.00	14.94
1969	4.50	.82	3.68	18.00	14.32
1970	5.16	2.20	2.96	18.00	15.04
1971	5.31	4.29	1.02	18.00	16.98
1972	5.52	3.97	1.55	18.00	16.45
			DUMAS HELIUM PLANT		
1966	5.93	.00	5.93	18.00	12.07
1967	6.46	.78	5.68	18.00	12.32
1968	5.91	1.01	4.90	18.00	13.10
1969	6.55	.31	6.24	18.00	11.76
1970	5.89	1.04	4.85	18.00	13.15
1971	6.39	1.58	4.81	18.00	13.19

Reasonable Value Calculations—Continued

	F Vol. of Ashland Helium Extracted by Phillips (Plt's Ex. 14 & 15, Sch. 3)	G Total Reasonable Value of Ashland Helium Extracted by Phillips Awarded to Ashland	H Periods (Yrs.) at Interest to July 1, 1973	I Interest at 6% per Year	J Total Recovery By Ashland
			SHERMAN HELIUM PLANT		
	m.c.f.				
1963	7,791	$110,554.29	9½	$63,015.95	$173,570.24
1964	8,976	117,667.32	8½	60,010.33	177,677.65
1965	8,997	127,847.37	7½	57,531.32	185,378.69
1966	7,521	108,001.56	6½	42,120.61	150,122.17
1967	5,757	81,288.84	5½	26,825.32	108,114.16
1968	6,742	100,725.48	4½	27,195.88	127,921.36
1969	6,033	86,392.56	3½	18,142.44	104,535.00
1970	5,460	82,118.40	2½	12,317.76	94,436.16
1971	5,944	100,929.12	1½	9,083.62	110,012.74
1972	6,082	100,048.90	½	3,001.47	103,050.37
			DUMAS HELIUM PLANT		
1966	431	5,238.38	6½	2,042.97	7,281.35
1967	950	11,704.00	5½	3,862.32	15,566.32
1968	949	12,431.90	4½	3,356.61	15,788.51
1969	890	10,466.40	3½	2,197.94	12,664.34
1970	681	8,955.15	2½	1,343.27	10,298.42
1971	444	5,856.36	1½	527.07	6,383.43
				TOTAL	$1,402,800.91

17. The Court finds that the attorneys for plaintiff have expended many hours prosecuting this lawsuit against the defendant and are entitled to be paid the total attorneys fees as set out below:

Jay W. Elston firm Houston, Texas	1059 hours at $50.00 1059 hours at $35.00	$ 52,950.00 37,065.00
Gerald Sawatzky firm Wichita, Kansas	550 hours at $50.00 275 hours at $35.00	27,500.00 9,625.00
John M. Imel firm Tulsa, Oklahoma	201.4 hours at $50.00	10,070.00
	TOTAL	$137,210.00

The Court finds that the plaintiff Ashland should have judgment against the defendant Phillips for attorneys fees in the total amount of $137,210.00 for the services as above specified.

18. The Court finds that Ashland has prosecuted this lawsuit for the total helium contained in the gas stream from its respective gas wells delivered by Ashland to Phillips; that in prosecuting this lawsuit the plaintiff Ashland has incurred and paid the following expenses which are not chargeable to the defendant Phillips, but were reasonable and necessary and should be paid on the basis of one-half by Ashland and one-half by the landowners, mineral owners, otherwise royalty owners.

WITNESS:

Leo Garwin 326 Oklahoma Mortgage Bldg. Oklahoma City, Oklahoma			
Professional Services	1969:	$ 2,810.40	
	1973:	7,260.95	$10,071.35
Troupe, Kehoe, Whiteaker & Kent Certified Public Accountants 2900 Power & Light Bldg. Kansas City, Missouri			
Professional Services		$24,600.00	
Travel Expenses		1,353.73	
Duplicating		425.00	$26,378.73
Tulsa Reporting Service 526 Mayo Building Tulsa, Oklahoma			
Depositions:	May, 1973	$ 277.15	
Transcript:	June, 1973	4,686.00	$ 4,963.15

Interrogs, Inc.
2439 Bank of the Southwest Bldg.
Houston, Texas 77002

Depositions:	April, 1973	$ 552.00	$ 552.00

Fulston, Siefkin, Powers & Eberhardt
Suite 600
4th National Bank Bldg.
Wichita, Kansas

	1968	1972	1973	
Travel	$157.12		$3,028.25	
Long Distance		$6.99	239.34	
Court Reporting Depositions			2,385.30	
Postage		.98	19.21	
Duplicating			434.40	
TOTAL	$157.12	$6.97	$6,106.50	$ 6,270.59

Martin, Logan, Moyers, Martin & Conway
National Bank of Tulsa Bldg.
Tulsa, Oklahoma

Expenses: (7-1-69 thru 12-31-72)			
Duplicating		$ 3.90	
Long Distance		56.81	
Travel		14.40	$ 75.11

Ashland Oil, Inc.
Employee Travel Expense

	1972	1973	
Ray Althouse		$169.50	
J. C. Coogan		160.23	
B. J. White		101.02	
D. W. Cox	$179.03	405.66	
	$179.03	$836.41	$ 1,015.44

WITNESS—Continued

Fulbright, Crooker & Jaworski
Bank of the Southwest Bldg.
Houston, Texas

	1966	1967	1968	1969	1970	1971	1972	1973
Long Distance	85.79	283.96	56.38	275.71	13.20	61.59	141.86	195.52
Duplicating	70.76	294.20	550.45	1,105.01	21.00	18.00	214.32	160.30
Filing Fees		25.00		15.00				
Travel		303.72	114.24	1,341.17	126.00	120.50	1,327.77	1,283.63
Printing				1,879.01	89.82			
Freight				11.30				
Secretarial				80.88			15.92	
TOTAL	156.55	906.88	721.07	4,708.08	250.02	200.09	1,699.87	1,639.45

Total Expenses	$10,282.01	
Less Amounts Incurred in Connection with FPC Proceedings	1,922.89	$ 8,359.12
TOTAL OF ALL EXPENSES INCURRED		$57,685.49

The Court finds that the Plaintiff expended $57,685.49 in the prosecution of this lawsuit which is not assessable or taxable as costs against the defendant, Phillips, and that these costs should be divided equally between plaintiff and landowners, mineral owners (hereinafter referred to as royalty owners), and from the distribution made by plaintiff, Ashland, to royalty owners first should be deducted one-half of the cost above stated as paying the cost assessable to royalty owners.

19. The Court finds from a review of the pleadings, the Complaint, Amended Complaint, Stipulation of Facts, the exhibits and testimony that Ashland has brought, prosecuted and maintained this action on its own behalf and on the behalf of the royalty owners for the delivery of helium in the entire gas stream on a per well-head basis from the inception of the production of helium to June 30, 1972. The Court takes judicial knowledge of the oil and gas leases executed by royalty owners in favor of the lessee and the assignee of the leasee, and that at the time of entering into each of the respective oil and gas leases, no thought of helium rights was considered by either lessee or lessor; that no consideration passed from one to the other for any

helium rights; that the helium as contained in the gas was an undealt with commodity except that the lessee had the exclusive right to enter upon the lessor's property and drill and produce gas from said premises; that the exclusive right to drill and produce gas is a perpetual right vested in the lessee so long as oil and as is produced in paying quantities from the premises by Ashland or its assigns.

The Court finds that the helium hereinabove referred to is and was the sole property of the royalty owners subject to the exclusive right of Ashland to drill and produce gas which contained helium and that their rights are equal and that the proceeds to be derived from the sale of helium should be equally divided between Ashland and the royalty owners and therefore the judgment herein rendered in favor of the plaintiff, Ashland, and against the defendant, Phillips, should be divided equally between Ashland and the royalty owners and on the basis of the payments heretofore made by Ashland to the royalty owners for gas produced and sold to Phillips and transported in interstate commerce under the regulations of the Federal Power Commission; and that Ashland shall first deduct from the royalty owners' portion of the judgment one-half of the costs of prosecuting this action. The equal division between lessor and lessee of the proceeds from the helium is required in equity; otherwise the windfall would give 7/8 to Ashland and 1/8 to the royalty owners, which would be unconscionable and an unjust enrichment to Ashland.

Conclusions of Law

This litigation is based primarily on the 1960 Act of Congress known as the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.) where the United States was authorized and directed to enter into a program of conservation of helium for future use.

The evidence is convincing to this Court that the United States, through the defendant, Phillips, and by reason of the Helium Act, confiscated the helium of the plaintiff and royalty owners rather than acquiring it by condemnation; nevertheless, the taking was in the nature of condemnation, and the reasonable value of the helium plus interest is proper; that the United States was obligated to pay the reasonable value of said helium in excess of $3.00 per m. c. f. which Phillips was required to pay for the helium all as provided by their contract.

The Court concludes that the law contained in Northern Natural Gas Co. v. Grounds, *supra* governs this case in the matter of reasonable value of helium and the obligation of the defendant to pay that value, and no other authorities need be cited.

Further the United States Court of Appeals for the Tenth Circuit laid down certain guidelines for trial courts in Texaco Inc. v. Phillips Petroleum Company, 481 F.2d 70 (opinion filed July 13, 1973). Here the Court said:

> "We have here another controversy over helium. The basic background is outlined in our decision in the Consolidated Helium cases. See Northern Natural Gas Company v. Grounds, * * *. We there held that lessee-producers of natural gas could recover the reasonable value of contained helium out of interpleader funds created by the government's purchases of helium from helium extraction companies and parent pipeline companies.
>
> * * * * * *
>
> In Consolidated Helium we considered the claims of the pipelines and helium separation companies that they were entitled under their gas purchase contracts to receive the entire gas stream at the Federal Power

Commission service rate and said that '*private contract law and the principles applicable thereto are not controlling.*'

(Emphasis Added)

• • • • • •

No good purpose would be served by repeating our analysis of the Natural Gas Act and the 1960 Helium Act amendments. We held that, • • •

'• • • the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants.'

• • • • • •

We thought that we made plain that we did not allow recovery on the application of any principles of equity, see 441 F.2d at 719-720, but on the ground that satisfactory utility regulation does not permit a utility rate to be used to obtain a commodity which is not within the contemplation of that rate.

• • • • • •

We reject the defendant's assertion that Consolidated Helium was an interim decision. The Supreme Court denied certiorari, 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267, 404 U.S. 1063, 92 S.Ct. 732, 30 L.Ed.2d 751, and 404 U.S. 1065, 92 S.Ct. 732, 30 L.Ed.2d 754. The decision is final and is the law of this circuit. We say nothing on plaintiff's claim that Consolidated Helium is res judicata on the issues presented here. We are concerned with jurisdiction, not with the merits.

• • • • • •

In Consolidated Helium we pointed out that there are over 30,000 persons receiving income from helium

bearing natural gas produced by over 500 lessee-producers under thousands of leases.

• • • • • •

The problems relating to the recovery of the value of the helium content of natural gas traveling in interstate commerce have arisen because of, and under, federal statutes. Plaintiff asserts rights under those statutes and is entitled to sue in federal court. We believe the federal courts have jurisdiction under 28 U.S.C. § 1331(a)."

The Court concludes as a matter of law that the plaintiffs are entitled to a legal rate of interest because of the taking. See St. Paul Mercury Indemnity Co. v. United States, 201 F.2d 57 (C. A. 10); T. & M. Transp. Co. v. S. W. Shattuck Chemical Co., 158 F.2d 909 (C.A. 10); Louisiana & Arkansas Railway Co. v. Export Drum Co., 359 F.2d 311 (C.A. 5); Jacobs v. United States, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933).

The Court in Northern Natural Gas Company et al. v. Grounds et al., 441 F.2d 704 (10 Cir.), cert. denied, 404 U.S. 1063-1065, 92 S.Ct. 732, 30 L.Ed.2d 751, issued a post-opinion order, pertaining to costs and the mandate, recognizing the significance of the interest question. Paragraph 15 of the Order dated March 16, 1972, states:

> "The right of the lessee-producers to interest, and the amount thereof, on any sums which the District Court may adjudge to be due and owing to them shall be determined by the District Court, subject to review by this Court."

The Court concludes as a matter of law that the plaintiff's attorneys are entitled to be paid by the defendants a reasonable attorneys' fee. See United States Fidelity & Guar. Co. v. Hendry Corporation, 391 F.2d 13 (C.A. 5); Boyd Callan, Inc. v. United States, 328 F.2d 505 (C.A. 5).

In T. F. Scholes, Inc. v. United States, 295 F.2d 366 at 370 (C.A. 10) the Court said:

> "The fixing of reasonable attorneys fees rested in the sound judicial discretion of the court. . . ."

In Texas Gas Corporation v. Hankamer, 326 S.W.2d 944 (Tex.Civ.App.) it was held that gas and distillate delivered by appellees and processed in a plant was "material furnished," and an award of attorneys' fees was upheld.

The Court concludes as a matter of law that the plaintiff is entitled to judgment as follows:

(a) That plaintiff, Ashland, should have judgment against defendant, Phillips, for helium extracted for the ten-year period from 1963 to December 31, 1972, together with yearly interest thereon at the rate of 6% per annum ending June 30, 1973, in the total amount of $1,402,800.91.

(b) That plaintiff should have judgment for attorneys' fees, otherwise professional services rendered by plaintiff's attorneys in the prosecution of this action in the amount of $137,210.00.

(c) That the royalty owners should be paid one-half of the proceeds derived from the sale of helium less one-half of the expenses of $57,685.49 incurred and paid by Ashland in the prosecution of this action and not chargeable to the defendant Phillips.

(d) That the prayer of the Intervenor United States of America is denied.

An appropriate judgment will be entered as herein provided.

JUDGMENT

Based upon the Memorandum Opinion, Findings of Fact and Conclusions of Law filed herein this day, the Court enters the following judgment:

1. It is ordered, adjudged and decreed by the Court that plaintiff Ashland Oil, Inc., shall have judgment against defendant Phillips Petroleum Company in the amount of $1,402,800.91 together with accruing interest as provided by law from date of judgment, until paid, for helium sold and delivered during the ten-year period ending December 31, 1972.

2. It is further ordered, adjudged and decreed by the Court that plaintiff Ashland Oil, Inc. shall have judgment against the defendant Phillips Petroleum Company in the amount of $137,210.00 together with accruing interest as provided by law from the date of this Judgment until the Judgment is paid as reasonable attorneys' fees in the prosecution of this action.

3. It is further ordered, adjudged and decreed by the Court that Ashland Oil, Inc., on receipt of the payment of the helium together with interest thereon, as provided in item (1) above, shall deduct therefrom its expenses of prosecution in the amount of $57,685.49 and pay to its royalty owners on the basis of payments heretofore made to its royalty owners for gas sold and delivered and transported in interstate commerce one-half of said helium receipts together with its one-half of the accrued and accruing interest.

4. It is further ordered, adjudged and decreed by the Court that the defendant Phillips Petroleum Company pay the usual and ordinary costs of this litiation as provided by the Federal Rules of Civil Procedure.

5. It is further ordered, adjudged and decreed by the Court that the prayer of the Intervenor, United States of America, be, and the same is hereby denied. The defendant Phillips Petroleum Company has made no claim for relief as against the United States of America.

Supreme Court, U. S.
SEP 6 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-221

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

ASHLAND OIL, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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September 2, 1977

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OCTOBER TERM, 1977

No. 77-221

PHILLIPS PETROLEUM COMPANY,
Petitioner,

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ASHLAND OIL, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions delivered in the courts below (A. 3a, 53a) are reported in 554 F.2d 381 (10th Cir.), and 364 F.Supp. 6 (N.D. Okla.).

QUESTIONS PRESENTED

1. In a suit by a gas producer to recover the reasonable value of helium delivered by it to a helium extractor, did the court of appeals correctly hold that federal law should apply to the peripheral issues of prejudgment interest, limitations, and attorneys' fees, when:

(a) the United States acquired the extracted helium from the extractor under a long-term government contract obligating the government to pay a base price, plus certain additional amounts which the helium extractor was required to pay to the producer for the helium delivered, as a result of this litigation; and

(b) the producer's *quantum meruit* right of recovery arose because superseding federal statutes and regulations requiring uniform national application dictate that the helium extractor's payment for natural gas, in which the helium is commingled, does not constitute any payment for helium contained therein?

2. Did the court of appeals correctly hold that the helium extractor's payment to the producer of a rate for natural gas, filed with and approved by the Federal Power Commission as authorized by the Natural Gas Act, was not a payment for helium commingled with the natural gas, when:

(a) Section 11 of the Helium Act provides that rates authorized by the Natural Gas Act are not applicable to helium commingled in natural gas; and

(b) this question was previously decided in *Northern Natural Gas Company* v. *Grounds, et al.*, 441 F.2d 704 (10th Cir.), and certiorari was denied by this Court, 404 U.S. 1063 (January 24, 1972)?

STATUTES INVOLVED

Subsections (a), (b) and (c) of Section 4 of the Natural Gas Act, 52 Stat. 822, 76 Stat. 72, 15 U.S.C. §717c; and Section 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. §167i, are reprinted in the Appendix to this brief, infra.

STATEMENT OF CASE

Helium is a rare, noncombustible gaseous element whose unique qualities have made it indispensable for innumerable uses by industry and the government. Its only commercial source is from natural gas with which it is commingled. Ninety-nine percent of the nation's (and the free world's) native helium resources are contained in the Hugoton-Panhandle Gas Fields of Southwestern Kansas, Western Oklahoma and Northwestern Texas.

Reflecting the urgent need to conserve this valuable natural resource for the future, when these gas fields would be depleted by use of the natural gas for fuel purposes, Congress in 1960 authorized the Secretary of Interior to enter into long-term contracts for conservation of this helium. 50 U.S.C. §§167a, et seq. Section 11 of the Helium Act provided that the Natural Gas Act should not be applicable to this commingled helium.[1]

In 1961 the Secretary entered into long-term helium acquisition contracts with petitioner, Phillips Petroleum Company, and with three other companies, all of whom controlled the flow of helium-bearing natural gas at large centrally located pipelines. Anticipating future claims by lessee-producers, such as Ashland Oil, Inc., for a helium payment (441 F.2d at 709), the government contracts contained special price provisions, under which the government was obligated to pay, *first*, base prices averaging $11.00 to $12.00 per m.c.f. of extracted helium, and, *second*, an additional amount equivalent to the price required to

1. The facts relating to helium and the conservation program are recited in *Northern Natural Gas Company* v. *Grounds*, 441 F.2d 704, cert. denied, 404 U.S. 951, 1063. Other facts also in the present Record, consisting of three volumes of the Appendix below, plus seven volumes of an Exhibit Appendix, are hereafter cited as "R. Vol. ....."; and as "R. Ex. Vol. .....".

be paid to third parties for the commingled helium supplied by them (less approximately $3.00 per m.c.f., which Phillips Petroleum Company, and the other companies assumed). (R. Ex. Vol. I, p. 93).

Accordingly, these four companies commenced extracting the helium in about January, 1963, delivering it to the government for storage in an underground reservoir near Amarillo, Texas. The government is mandated by statute to store the helium for future sale and beneficial use, so that the ultimate sales proceeds will repay all costs, including all acquisition costs, and interest. 50 U.S.C. §167d. There is no doubt that it will do so, because, upon depletion of commercial sources in natural gas, helium will have to be obtained from the atmosphere at costs approximating $6,000.00 per m.c.f. (ERDA Report, April 11, 1975). This compares to purified helium competitively marketed during the years in question, 1963-1972, at prices ranging from $35.00 to $20.00 per m.c.f. (The crude, or impure, helium acquired by the government for conservation storage, costs $2.00 per m.c.f. to purify.)

In 1963 the three other companies who had contracted to extract and deliver conservation helium to the government filed class action interpleader cases in the United States District Court for the District of Kansas, against certain gas producers supplying helium to the plants, and against landowners having royalty interests under oil and gas leases from which the helium-bearing natural gas was produced, seeking to determine liability for payment to these parties. Landowner class representatives also filed suits against the government in the same court concerning helium payment. Both Ashland Oil and Phillips Petroleum Company were parties to two or more of these cases, all of which were consolidated as *Northern Natural Gas Company* v. *Grounds, et al.*

Among massive consolidated pleadings filed by landowners in the Kansas cases were class action claims against Phillips Petroleum relating to helium extracted by it. Ashland Oil then filed pleadings seeking to make claim against Phillips Petroleum Company. The court order consolidating the cases also enjoined all parties from filing any other actions concerning the subject matter of the suits. (Docket #81, KC 1969). However, by early 1967, landowners had dismissed their claims against Phillips, and Ashland withdrew its claim against Phillips, without prejudice to filing a separate action against Phillips, which was approved by order of the Kansas court. (R. Ex. Vol. VI, pp. 1268-1269).

The present action was then promptly commenced by Ashland Oil against Phillips in March, 1967. In addition to seeking recovery for the value of commingled helium supplied to Phillips for extraction and delivery to the government, this suit also sought to recover over one-half million dollars for Phillips' deficiencies in payments for jurisdictional natural gas delivered.[2] Ashland's natural gas sales contracts with Phillips provided a formula for price increases tied to price increases obtained by Phillips on resale of the natural gas to Michigan-Wisconsin Pipeline Company. All these sales were subject to FPC rate regulation. Ashland had not filed with the FPC for increases in rates to which it was entitled, but Ashland claimed that Phillips' own filings as a gasoline plant operator were sufficient to cover Ashland's price increase. (R. Vol. I, pp. 1, 8, 33; R. Ex. Vol. I, pp. 1-34).

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2. Jurisdictional natural gas is the hydrocarbonous fuel regulated by the Federal Power Commission. The noncombustible helium commingled with natural gas is not subject to FPC jurisdiction. 50 U.S.C. §167i.

Phillips then initiated a proceeding before the Federal Power Commission asking that agency to assert its primary jurisdiction to determine that Ashland was not entitled to payment of the deficiency because it had not filed for an increase with the FPC. The FPC ruled in favor of Phillips, but in doing so carefully noted that it had no jurisdiction over the price of the commingled helium delivered by Ashland. 40 FPC 390. The Sixth Circuit affirmed this decision in *Ashland Oil & Refining Co.* v. *FPC*, 421 F.2d 17 (1970).

Thus, there remained only the claim against Phillips for payment of the reasonable value of the helium delivered to Phillips. The United States intervened as a party because of its contract obligation requiring it to reimburse Phillips for part of the helium payment. (R. Vol. I, p. 63). The district court in Oklahoma stayed the action pending appeals then being taken from the Kansas consolidated cases on the question of entitlement to helium payment. In *Northern Natural Gas Company* v. *Grounds*, 441 F.2d 704 (10th Cir. 1971), cert. denied, 404 U.S. 951, 1063, the court ruled that payment of FPC service rates for jurisdictional natural gas did not constitute any payment for helium so that producers delivering the commingled helium were entitled to a *quantum meruit* right to recover the reasonable value of their helium from the three other companies, subject to a requirement that royalty payments be made by producers to landowners having royalty interests.

After this Court denied certiorari in those cases in January, 1972, this case proceeded to trial and judgment in 1973. (364 F. Supp. 6). As required by the *Grounds* decision, Ashland was awarded a reasonable value for its helium. Determining that federal policies were applicable,

the district court also awarded Ashland prejudgment interest, and held that Ashland was not barred by limitations. Based on federal Miller Act cases which had held that state statutes for attorneys' fees in like cases should be adopted as federal law, the district court also awarded Ashland attorneys' fees under a Texas state statute. Tex. Ann. Stat., Art. 2226.

Prior to argument and decision in the appeals by Phillips and the United States, this Court decided *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125 (1974), holding that a claim for reasonable value of helium against Phillips was a quasi-contractual action or one in *quantum meruit* "whose source is state law and not federal law." Thus federal question jurisdiction under 28 U.S.C. §1331 (a) did not exist. However, this Court gave full recognition to the determinative impact of federal law in precluding any state law *defense* that payment of the contract price for natural gas, filed as an FPC rate, constitutes payment for the commingled helium:

> ". . . The essence of the Grounds decision was its rejection of the buyers' [Phillips'] contention that the contract price was compensation for the gas stream in its entirety . . ." (415 U.S. at 126).
>
> ". . . In other words, the Grounds case simply held that payment for natural gas at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium constituent and cannot be asserted as a defense to a suit for the recovery of the value of that helium. . ." (415 U.S. at 128).

Thus, in this diversity jurisdiction case, the court of appeals strictly adhered to this Court's analysis of the

Grounds decision by ruling that Phillips' defense of payment of a contract price for natural gas, a rate filed with the FPC, was of no avail, and that Ashland was entitled to recover the value of its helium. (554 F.2d at 384). Recognizing the impact of federal statutes, and the direct result of a recovery by Ashland upon the United States itself, the court ruled that federal law should be applied to the peripheral issues of prejudgment interest, limitations, and attorneys' fees; just as federal law itself should be applied, as this Court had recognized, to preclude a defense of payment. Thus, it affirmed the award of prejudgment interest, and held that any limitations statute was tolled by reason of the Kansas litigation which had effectively prevented Ashland from filing suit until permitted by the Kansas federal court order in early 1967. But it reversed the district court award of attorneys' fees based upon this Court's later decision in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974) (which reversed the line of Miller Act cases on which the district court had relied). (554 F.2d at 389-392).

The court of appeals granted a rehearing *en banc* because the district court of Kansas in the *Grounds* case had made some disparate findings on the factual dispute concerning value of helium, which needed to be resolved on a consistent basis. Accordingly, the *en banc* decision essentially adhered to the initial three-judge decision, but remanded several factual matters for further hearing in the district court. (554 F.2d at 392).

ARGUMENT

In awarding Ashland the reasonable value of its helium, the court of appeals applied the law enunciated in its *Grounds* decision, which had denied the precise defense of payment which is now pursued by Phillips in its petition. This Court denied petitions for certiorari in *Grounds* which raised the precise point Phillips now raises; and in *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125, this Court also recognized that the applicable federal statutes precluded Phillips' defense of payment of a contract price filed as a natural gas rate schedule with the FPC. The attempt, at this late date, to renew this rejected defense, is without merit, and should be denied.

The only question present here which was not considered in *Grounds* is whether federal law or state law should be applied to the peripheral issues of prejudgment interest, limitations, and attorneys' fees. Because of federal nondiscriminatory natural gas rate policies, and because the government's contract obligations would be directly affected by this litigation, the court of appeals was obliged to apply federal law, so as to prevent a nightmare of conflicting results based upon the divergent laws of different states.

The decision below is in accord with analogous decisions of this Court, and is not in conflict with any other decision. It accomplishes substantial justice by requiring payment of a reasonable value for the unregulated commodity, helium, to those producing and supplying it. It in no way affects consumer prices for natural gas. It permits the helium extractors to profit from their unregulated helium extraction operations, while at the same time requiring them to pay helium suppliers, who would other-

wise receive no payment for the valuable commodity they supply.·

I. The Court of Appeals Correctly Decided That Federal Law Should Be Applied to the Peripheral Issues of Prejudgment Interest, Limitations and Attorneys' Fees

In its petition, Phillips presents a spurious question concerning federal law, induced largely by a faulty analysis of *Northern Natural Gas Company* v. *Grounds*, 441 F.2d 704, cert. denied, 404 U.S. 1063, and of *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125 (1974). In doing so, Phillips unfairly charges the court of appeals of attempted "evasion" of this Court's *Texaco* holding. Nothing could be further from the truth.

A casual review of the *en banc* opinion reveals that the court of appeals rejected Phillips' defense of payment based on its holding in *Grounds*, which had definitively ruled against its position. As this Court noted in *Texaco*, Phillips is precluded from raising the defense of payment under state law because of the "federal statutory provisions . . ." (415 U.S. at 128). Although federal question jurisdiction did not exist, obviously federal law was applied to preclude defenses, and this federal law, therefore, superseded any state law to the contrary.

The transparent attempt by Phillips to infer from the *Texaco* holding concerning lack of federal question jurisdiction, the result that federal law was wholly irrelevant to the controversy, is so obviously erroneous that little further discussion is warranted.

This is made plain again by the *en banc* decision below in discussing the issues of prejudgment interest, limitations and attorneys' fees. (554 F.2d at 389, et seq.).

For it is only in connection with these issues that the court of appeals discussed the question of federal *vs.* state law. The court, of course, recognized that federal law had been "applied" on the issue of liability, just as this Court recognized in *Texaco* that federal law was applied to preclude the defense of payment. But that was a point already settled.

Having already, in *Grounds*, applied provisions of the federal Natural Gas Act and Helium Act to determine that jurisdictional natural gas rates did not provide payment for nonjurisdictional helium, it remained for the court to analyze the federal policies and the interest of the government on the peripheral issues mentioned. The government contract with Phillips was an important element in the decision to apply federal law. This contract, as well as the other helium conservation contracts, was the device utilized by the government to acquire the helium because it was recognized that condemnation proceedings involving thousands of royalty owners and producers would be unmanageable and cause great delay in conservation. (554 F.2d at 384).

The price provision of the government contract provided for an initial base price, but also provided that the government would pay additional amounts which Phillips became obligated to pay third parties, less about $3.00 per m.c.f. which Phillips assumed. Anticipating litigation, the contract stated:

> ". . . Any such payment to qualify for inclusion hereunder shall be made only with the consent of Buyer [United States] and for the purposes of this paragraph 7.4 Buyer shall be deemed to have consented to any and all such payments in satisfaction or settlement of any claims to helium in the natural gas, as

defined herein, or to any interest in such helium that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state." (R. Ex. Vol. I, p. 93).

It was because the government had, by contract, already agreed to be bound by the results of litigation against Phillips, that it intervened below to protect its interest. The judgment in this case directly affects the government's obligation to pay under the contract. Moreover, it was in the interest of the government to perfect its title to the conservation helium by making appropriate payment. Contrary to petitioners' contention, absent payment for the helium, "title fails just as surely as it does where either restitution or rescission is appropriate." (441 F.2d at 723).

The court of appeals *en banc*, noted the obvious fact that there were a "multitude of interest owners from many states relating to production from Kansas, Oklahoma, and Texas" and that there were divergent laws in those states on the pertinent questions. (554 F.2d at 390).

In these circumstances application of the doctrine of *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), and the line of cases following it, as discussed in the opinion below, was clearly called for. Among the cases cited in the opinion is *United States* v. *County of Allegheny*, 322 U.S. 174 (1944), in which the government contracted with a gun manufacturer, and agreed in the contract to reimburse all costs, including any local taxes imposed on the contractor for its use of government owned machinery, which were sustained by litigation. The United States intervened because of its contractual obligation to reimburse the contractor. This Court held federal law must govern.

The correctness of the *en banc* decision is also highlighted by this Court's recent case of *Miree* v. *DeKalb County*, No. 76-607, decided June 21, 1977. Survivors of persons killed in a plane crash sued the county, alleging they were third party beneficiaries of a contract between the county and the FAA. Since no substantial rights or duties of the United States hinged on the outcome of the litigation, the *Clearfield Trust* rationale was held inapplicable. This was only because the litigation "raises no question regarding the liability of the United States or the responsibilities of the United States under the contract."

In contrast to the facts in *Miree*, here the liability of the United States is directly affected by the outcome of this litigation, which was anticipated and provided for in that contract.

Considering that the federal helium conservation program involves helium from three states, and involved parties from many states, and the divergent laws of these states, it would be wholly improper to deny the clear application of the *Clearfield Trust* doctrine as expounded in the later cases. Moreover, any one claimant may have helium-bearing gas with sources in three different states pass through one helium conservation plant. Must the government's rights and obligations vary as to that one claimant by distinguishing the helium originating in each state? To ask this question is to answer it. As stated below:

> ". . . In the face of the multitude of claimants, the variations in state law, and the *Clearfield* doctrine, the trial court was correct in not applying *Erie* v. *Tompkins*." (554 F.2d at 391).

Moreover, the federal statutes, construed in *Grounds*, which preclude the defense of payment, so dominate the practical results of the controversy, that peripheral questions should be uniformly decided to accomplish the uniformity and nondiscrimination mandated by these statutes. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942); *Grand Bahama Petroleum Co.* v. *Asiatic Petroleum*, 550 F.2d 1230 (2nd Cir. 1977).[3] The principles of *Sola Electric*, requiring applicable federal policies to be effectuated in a diversity case, therefore, require application of federal law to the peripheral issues herein, entirely apart from the *Clearfield Trust* doctrine.[4]

Petitioner's assertion that the valuation method approved by the *en banc* opinion was dependent on applying federal law is not well taken. As indicated in the opinion, the valuation method approved is widely used in the oil and gas producing states, particularly in determining value of components of a gas stream which are extracted in a field plant. The value of the component, such as helium, or gasoline liquids, prior to extraction is directly related to its wholesale value after extraction, taking into account the expenses and a profit for the plant operator.

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3. The court of appeals found it unnecessary to decide whether the two year, or four year, Texas limitation statute applied, because it considered any limitation statute to be tolled, referring to the related Kansas cases. As previously indicated, those class actions involved claims against Phillips which were not eliminated until January, 1967, in an order which then, for the first time, permitted Ashland to file a separate suit, free from the existing injunction. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). These facts distinguish *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), cited by petitioner, see discussion in 421 U.S. at 467. *Cf.*, *Burnett* v. *New York Cent. R. Co.*, 380 U.S. 424 (1965).

4. Phillips' petition does not present any reason why it should not pay interest on the value of helium supplied by Ashland. The limitations question is unique to Phillips, and is not present in *Grounds*. Applying federal law enabled Phillips to avoid liability for attorneys' fees under a state statute. These peripheral issues, thus, are of limited significance.

Both state and federal courts, and the government itself, regularly apply this method in appropriate circumstances involving applications of both federal and state law.[5]

II. The Court of Appeals, in Following Its Decision in Northern Natural Gas Company vs. Grounds, Correctly Held That Federal Law Precluded Phillips' Defense of Payment

In asserting that its payment of FPC rates for natural gas also constitutes payment for nonjurisdictional helium, Phillips is, in reality, seeking review of the *Grounds* case, in which this Court denied certiorari more than five years ago.

Grounds held that the helium extracting natural gas companies must pay reasonable value for helium, without reference to the contract price, whether that price was more than, the same as, or lower than the FPC ceiling rate:

> "In answer the Helex companies say that under the Natural Gas Act the FPC fixes ceiling prices and does not impose a flat rate. Although this is true, the ceiling rate, or the lower filed rate, is the lawful rate and there may be no deviation therefrom. See *Western Union Telegraph Co.* v. *Esteve Brothers & Co.*, 256 U.S. 566, 571, 41 S.Ct. 584, 56 L.Ed. 1094. Section 4(b) of the Natural Gas Act, 17 U.S.C. Sec.

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5. The single dissent from the *en banc* decision concerned factual issues relating to helium value, and did not disagree with the points sought to be reviewed by Phillips. In going beyond the record, the dissent unfortunately exaggerated the amount of helium subject to value litigation by some 200%. For example, the Phillips-U.S. contract provided that the U.S. need pay nothing additional for helium produced from Phillips' own leases. Phillips produced 50% of all the helium it extracted and delivered to the United States.

717c(b), forbids 'any undue preference or advantage' to any person." (441 F.2d at 720).

The Federal Power Commission rate for natural gas is, by law, limited to the natural gas over which it has jurisdiction under authority of the Natural Gas Act. Section 11 of the Helium Act, 50 U.S.C. §167i, provides that the Natural Gas Act does not apply to sale or delivery of helium commingled in the natural gas. Thus, the law mandates that FPC natural gas service rates do not, and cannot, constitute a payment for commingled helium. There is no contract provision between Ashland and Phillips that specifies a payment for commingled helium. The contracts merely provide a price per m.c.f. Thus, whether the FPC allows that stated price, or a different price, as a natural gas rate, the payment of that rate is clearly not for helium. To then allow Phillips to have valuable helium without payment would be "startling", to use the court's languge in *Grounds* (441 F.2d at 719).

It is for these elementary reasons that this Court in *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125 (1974), recognized that Phillips' defense of payment was precluded by federal law, giving rise to a claim in *quantum meruit* for reasonable value. *Quantum meruit* refers to that class of obligations "imposed by law, without regard to the intention or assent of the parties bound, for reasons dictated by reason and justice." *Carpenter* v. *Josey Oil Co.*, 26 F.2d 442 (8th Cir.).[6]

6. Phillips' argument that under Texas law, an express contract precludes recovery on an implied contract (Petition, p. 23), wholly ignores that its defense of payment cannot be asserted because of applicable federal law. It also ignores the recognition by this Court in *Phillips Petroleum Company* v. *Texaco* that the claim against Phillips is in *quantum meruit*, a claim not based on express or implied contract, but based, rather, on an obligation imposed by law regardless of the assent of the parties.

Phillips asserts that it should not pay for valuable helium, beyond FPC rates for jurisdictional natural gas. This would result in absolutely no payment for the helium itself. In fact, the helium value obtained by Phillips, if not paid for, as a practical matter results in its obtaining jurisdictional natural gas for a fraction of the FPC natural gas rate, which other natural gas companies, not extracting helium, must, however, pay in full. This is not reasonable, and it is not justice. Moreover, as noted by the court of appeals in *Grounds*, that result would directly violate Section 4(b) of the Natural Gas Act, which forbids "any undue preference or advantage" to any person.

The *Grounds* case was decided upon a complete record containing gas contracts filed as FPC rate schedules, having prices higher than, the same as, and lower than, the approved FPC rate.[7] The position now urged by Phillips was urged in *Grounds*, and in petitions for certiorari to this Court, as well as in the Memorandum of the United States in support. For the compelling reasons stated in *Grounds*, this position was correctly rejected.

Thus, even were we to accept Phillips' contention that its gas contract prices are unaffected in amount by FPC regulation, its argument is untenable. However, Phillips fails to tell the whole truth about its contract prices. As we have noted herein, Ashland's contract prices are tied to increases in rates obtained by Phillips from Michigan Wisconsin Pipeline Company to whom it resells the natural gas. Phillips' rates to that purchaser are directly regulated and limited by the FPC, as a result of the decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954), which case involved that very transaction. By

7. In *Grounds*, the court of appeals found it unnecessary to consider other theories for recovery of a helium payment.

this means, Ashland's contract prices, filed as FPC rates, are directly limited, affected and regulated under the Natural Gas Act.

The stubborn fact that Ashland's FPC filed rates for natural gas do not constitute payment for helium is also vividly illustrated by the FPC proceedings which were an outgrowth of this very case. *Phillips Petroleum Company* v. *Ashland Oil & Refining Company*, 40 FPC 390, affirmed in *Ashland Oil & Refining Company* v. *FPC*, 421 F.2d 17 (6th Cir.). Ashland was held not entitled to collect from Phillips over one-half million dollars in admitted deficiencies in payments below the contract price because an FPC filing for the increase was not promptly accomplished. Significantly, the FPC took note of this helium case pending between the parties, and firmly stated that "under Section 11 of the Helium Act Amendments of 1960, the Commission has no jurisdiction over the price of helium."

In essence, Phillips is here attempting to obtain judicial repeal of Section 11 of the Helium Act, and to substitute for it a judicial judgment that helium should be subject to the FPC's rate regulation under the Natural Gas Act. This effort must fail, just as the same effort failed in *Grounds*.

CONCLUSION

Phillips has misconstrued *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125 as holding that federal law is irrelevant to this case. In fact, this Court repeatedly emphasized that federal law was governing to preclude the very defense which Phillips now seeks again to resurrect here. In our case, diversity jurisdiction exists, and there is no claim to federal question jurisdiction.

The alleged federal law question, as stated by Phillips, thus, simply does not exist. It appears to be merely a thinly veiled effort to again attempt to obtain a review of the final *Grounds* decision, which correctly defined the legal rights of the parties.

The petition should be denied.

Respectfully submitted,

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September 2, 1977

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APPENDIX

Section 4 of the Natural Gas Act, 52 Stat. 822; 76 Stat. 72, 15 U.S.C. Sec. 717c, subsections (a)(b) & (c), provide:

"(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Section 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. Sec. 167i, provides in pertinent part:

"The provisions of the Natural Gas Act of June 21, 1938 (52 Stat. 821; 15 U.S.C. 717-717w), as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled. . ."

Supreme Court, U. S.
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No. 77-221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

PHILLIPS PETROLEUM COMPANY, *Petitioner*,

v.

ASHLAND OIL, INC., *et al.*, *Respondents*.

PETITION FOR REHEARING

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November 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-221

PHILLIPS PETROLEUM COMPANY, *Petitioner*,

v.

ASHLAND OIL, INC., *et al.*, *Respondents*.

PETITION FOR REHEARING

Petitioner Phillips Petroleum Company respectfully petitions for rehearing of the denial of its petition for certiorari on October 31, 1977.

A circumstance of substantial effect, within the terms of Rule 58(2), has intervened since the filing of the petition for certiorari and the brief in opposition of Ashland Oil, Inc. That circumstance is the filing by the United States, No. 77-530, of a petition to review the same judgment of which review is sought in this case.

The purpose of this petition for rehearing is to enable the Court to grant Phillips' petition for certiorari should it decide to grant the Government's petition. *Compare Pickett* v. *Union Terminal Co.*, 313 U.S. 591,

314 U.S. 704 (1941); *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386, 394 (1942).

Counsel for Phillips had understood, incorrectly as it now appears, that the pendency of the Government's petition was known to the Clerk's office and that the petition in Phillips' case therefore would not be acted on until the Government petition was ready for action. Phillips is filing at the same time as this petition a memorandum in support of the Government's petition for certiorari. In that memorandum we set out much of the discussion that had been planned for a combined reply brief in this case and memorandum in the Government's case. We note here only these points:

1. Phillips and the Government present a common question concerning the correctness of the decision below that federal statutes—the Natural Gas Act and Section 11 of the Helium Act, added by the Helium Act Amendments of 1960—entitle a producer/seller of helium to disregard the price term of a contract by which it has sold an entire natural gas stream, including helium. The Government's petition emphasizes one reason for review of that question by this Court: the court of appeals' reading of the federal statutes is of the greatest practical significance in laying Phillips and other purchasers of helium and the Government, which indemnified them, open to a potential liability in the hundreds of millions of dollars.

2. The Government urges that, if the statutes are read as nullifying contractual obligations, federal law and not state law properly governs the resulting judicial determination of the value of the helium; it urges further that the court of appeals' novel work-back method of valuation is an incorrect application of federal law. At the same time, the Government agrees that the question presented by Phillips—whether the court of appeals was correct in choosing federal law to govern its valuation of the helium—is an important question that may merit this Court's review. (U.S. Pet. 25.) Though Ashland in its brief in opposition has attempted to avoid the question by refusing to acknowledge that the court of appeals made a choice of law, the question is indeed an important one, with implications for many types of cases in which the Government stands in some relationship to a transaction between two private parties.

Petitioner therefore asks the Court to rehear and reconsider its denial of certiorari and upon such rehearing and reconsideration to grant the writ.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that this petition for rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58(2).

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